Office-Supreme Court, U.S.
FILED
OCT 15 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 514

JAMES ODDIE, EDWARD CWIERTNIEWICZ,
JOHN PENZAK, OSCAR KING,
HARRY C. BREMMER,
Petitioners,

v.

ROSS GEAR AND TOOL COMPANY, INC.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

HAROLD A. CRANEFIELD,
Counsel for Petitioners,
8000 E. Jefferson Avenue,
Detroit 14, Michigan.

GORDON A. GREGORY,
JOHN A. FILLION,
ROBERT S. ROSENFELD,
Of Counsel,
8000 E. Jefferson Avenue,
Detroit 14, Michigan.

Interstate Brief & Record Co., 356 Congress St. E., Detroit 26, Michigan

INDEX

	Page
Citations to Opinions Below	1-2
Jurisdiction	2
Questions Presented	2-3
Question No. 1	2
Question No. 2	2
Question No. 3	2-3
Question No. 4	3
Statute Involved	3
Statement of the Case	3-11
The Facts	3-5
The Proceeding Before the District Court	5-8
The Proceeding Before the Court of Appeals	8-11
Reasons for Granting the Writ	11-33
As to Question No. 1—In *Lincoln Mills* the Court held that under Section 301 (a) of the Labor Management Relations Act the rights of *unions* under collective bargaining contracts are federal rights for which the courts are to fashion a federal law of collective bargaining contracts. Are the individual rights of *employees* under collective bargaining contracts also federal rights for which federal law is to be fashioned?	14-22
As to Question No. 2—Whether, under the federal law of collective bargaining contracts (and as the court below decided, in conflict with the Second Circuit's *Glidden* decision	

Page

and the Third Circuit's *Viking* decision) the recognition clause (or preamble) of a contract delineates the geographic area within which the employees can exercise their seniority-recall rights? 22-28

As to Question No. 3—Whether, under the federal law of collective bargaining contracts (and as the court below refused to hold, in conflict with the Second Circuit's decision in *Glidden* and the Third Circuit's decision in *Viking)* the grant to employees of seniority-recall rights at a particular plant implies that those rights continue to adhere to the plant in the event it is moved to a new location, absent an express provision that they do not? 28-30

As to Question No. 4—Whether, under the federal law of collective bargaining contracts, the seniority-recall rights earned by employees under a contract are "vested" rights that survive the termination of the contract, in the absence of an express provision that they do not? 30-33

Conclusion 33

Appendix A—Opinions Below 35

Opinion of the Court of Appeals 35-50

Opinion of the District Court 50-60

Appendix B—Conflicting Opinions 61

Opinion of Court of Appeals for the Second Circuit in *Zdanok v. Glidden Co.* 61-74

Opinion of Court of Appeals for the Third Circuit in *Metal Polishers Union v. Viking Equipment Co.* 75-76

CITATIONS

Cases:

	Page
Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp., 348 U.S. 437	6, 12, 15, 16, 18, 21
Atkinson v. Sinclair Refining Co., 370 U.S. 238	13, 15, 19
Babcock Coal & Coke Co. v. Brackens Creek Coal Land Co., 128 W. Va. 676 (1946)	11
Bethlehem Steel Co., 50 LRRM 1013, 1015 (1962)	33
Communications Workers v. Ohio Bell Tel. Co., 160 F. Supp. 822 (N.D. Ohio 1958), affirmed, 265 F. 2d 221 (6th Cir. 1959), cert. denied, 361 U.S. 814	22
Consolidated Laundries Corp. v. Kraft, 185 F. Supp. 631 (S.D. N.Y. 1960)	22
Drake Bakeries, Inc. v. Local 50 American Bakery and Confectionary Workers, 370 U.S. 254	13, 19
Dura-Electric Lamp Co. v. Westinghouse Electric Corp., 249 F. 2d 5 (3rd Cir. 1957)	11
Dowd Box Co. v. Courtney, 368 U.S. 502	15, 17, 18
Fried et al. v. Glenn Elec. Heater Corp., 198 F. Supp. 249 (D. N. J. 1961)	14, 22
Garfield Local 13-556, Oil Workers Union v. Heyden Newport Chem. Corp., 172 F. Supp. 230 (D.N.J. 1959)	22
Gilba v. IUE, 50 LRRM 2299 (D. C. Conn. 1962)	22
Glidden v. Zdanok, 370 U.S. 530	15, 20, 21, 29
H. H. Robertson Co., 37 Lab. Arb. 928 (1962)	14
IAM Local 1912 v. United States Potash Co., 270 F. 2d 496, 499 (10th Cir., 1959), cert. denied, 363 U.S. 845	23
IAM Local Lodge 2040 v. Servel, Inc., 268 F. 2d 692 (7th Cir. 1959), cert. denied, 361 U.S. 884	6, 22

	Page
ILGWU v. Jay-Ann Co., 228 F. 2d 632 (5th Cir. 1956)	22
Jenkins v. King, 244 Ind. 164 (1946)	11
Kosley v. Goldblatt Bros., Inc., 251 F. 2d 558 (7th Cir. 1958), cert. denied, 357 U.S. 904	22
Lewis v. Benedict Coal Corp., 361 U.S. 459	13
Lewis v. Fentress Coal & Coke Co., Inc., 160 F. Supp. 221 (M. D. Tenn. 1958), affirmed, 264 F. 2d 134 (6th Cir. 1959)	23
Local 180, UAW v. J. I. Case Co., 185 F. Supp. 130 (E.D. Wis. 1960)	22
Local 174, Teamsters Union v. Lucas Flour Co., 369 U.S. 95	13, 15, 18, 19, 21
Loew's Inc., 32 Lab. Arb. 740 (1959)	23
Mastro Plastics Corp., v. NLRB, 350 U.S. 270	13
Metal Polishers Union v. Viking Equipment Co., 278 F. 2d 142 (3rd Cir. 1960)	2, 3, 12, 25, 27, 28, 30
NLRB v. Lion Oil Co., 352 U.S. 282	13
Panza v. Armco Steel Corp., 51 LRRM 2016 (W. D. Pa. 1962)	14
Sangamo Electric Co. v. Bradley, 46 L. C. ¶17843 (App. Ct. of Ill. 1962)	14
Selb Manufacturing Co., 37 Lab. Arb. 834, enforced sub nom IAM v. Selb, 49 LRRM 2366 (E. D. Mo. 1961), affirmed sub nom Selb v. IAM, 305 F. 2d 177 (8th Cir. 1962)	14
Standard Oil Co. v. Ogden & Moffett Co., 242 F. 2d 287 (6th Cir. 1957)	11
Sterling Faucet Co., 119 NLRB 1225 (1950)	23
Tacoma Printing Pressmen's Union, No. 44, 131 NLRB 1990 (1961)	23
Textile Workers Union v. Bates Mfg. Co., 158 F. Supp. 410 (D. Me. 1958)	21-22

Page

Textile Workers Union v. Lincoln Mills, 353 U. S. 448 ..... 2, 11, 13, 16, 17, 20, 21
Textile Workers Union v. Williamsport Textile Corp., 136 F. Supp 407 (N.D. Pa. 1955)..... 22
Tom Thumb Stores, Inc., 123 NLRB 833 (1959)... 23
Union Packers, Inc., 38 Lab. Arb. 619 (1962).... 14
Philips Chemical Co., 39 Lab. Arb. 82 (1962)..... 14
United Steel Workers v. American Manufacturing Co., 363 U.S. 564..... 13
United Steel Workers v. New Park Mining Co., 273 F. 2d 352 (10th Cir. 1959)..... 23
United Steelworkers v. Pullman Standard Car Mfg. Co., 241 F. 2d 547 (3d Cir. 1957)..... 21
United Steel Workers v. Warrior & Gulf Nav. Co., 363 U.S. 574..... 13
Zdanok v. Glidden Co., 185 F. Supp. 441 (S.D. N.Y. 1960) 20, 25
Zdanok v. Glidden, 288 F. 2d 99 (2d Cir. 1961), cert. granted on other grounds, 368 U.S. 814.. 2, 5, 9, 10, 12, 20, 21, 25, 26, 28, 29, 32, 33

Statute:

Section 301(a), Labor Management Relations Act, 61 Stat. 156 (1947), 29 U.S.C. §185(a) (1952).. 3, 6, 11, 15, 16, 17, 18, 19, 21

Miscellaneous:

Aaron, Reflections on the Legal Nature and Enforceability of Seniority Rights, 17 Harv. L. Rev. 1532 (1962)..... 13-14
BNA Collective Bargaining Negotiations and Contracts (Basic Patterns in Union Contracts) Vol. 2 ..... 22, 24, 31

Page

Comment, 61 Colum. L. Rev. 1363 (1961) 14
Commonweal, Sept. 22, 1961, p. 4 14
Krock, Issue of Judicial Power to Rewrite Labor Contracts, N. Y. Times, Aug. 18, 1961, p. 20, col. 3 14
Krock, Jobs as "Vested Rights" Despite Location Changes, N. Y. Times, July 21, 1961 14
Lowden, Survival of Seniority Rights Under Collective Bargaining Contracts: Zdanok v. Glidden Co., 48 Va. L. Rev. 201 (1962) 14
Note, Vested Rights in the Runaway Shop, 13 W. Res. L. Rev. 360 (1962) 13
Oberer, The Corporation and the Rank-File Employee, 343 Annals 95 (1962) 13
U. Pa. L. Rev. Vol. 10, 458 (1962) 13
U. S. News & World Report, Aug. 7, 1961, p. 81 ... 14
U. S. News & World Report, Dec. 21, 1959, p. 89 .. 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No.....

JAMES ODDIE, EDWARD CWIERTNIEWICZ,
JOHN PENZAK, OSCAR KING,
HARRY C. BREMMER.
Petitioners,

v.

ROSS GEAR AND TOOL COMPANY, INC.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on July 16, 1962.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court (R. 112 (a)-20(a)) printed in Appendix A hereto (*infra*, p. 50)[1] is reported at 195 F. Supp. 826. The opinion of the Court of Appeals,

[1] "*Infra*" references are to the appendices of this petition.

printed in Appendix A hereto (*infra*, p. 35) is reported at 305 F. 2d 143.

JURISDICTION

The judgment of the Court of Appeals was entered on July 16, 1962 (*infra*, p. 35). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

Question No. 1

In *Lincoln Mills* the Court held that under Section 301(a) of the Labor Management Relations Act the rights of *unions* under collective bargaining contracts are federal rights for which the courts are to fashion a federal law of collective bargaining contracts.

Are the individual rights of *employees* under collective bargaining contracts also federal rights for which federal law is to be fashioned?

Question No. 2

Whether, under the federal law of collective bargaining contracts (and as the court below decided, in conflict with the Second Circuit's *Glidden* decision and the Third Circuit's *Viking* decision) the recognition clause (or preamble) of a contract delineates the geographic area within which the employees can exercise their seniority-recall rights?

Question No. 3

Whether, under the federal law of collective bargaining contracts (as the court below refused to rule, in conflict with the Second Circuit's *Glidden* decision and the Third

Circuit's *Viking* decision) the grant to employees of seniority-recall rights in a particular plant implies that those rights continue to adhere to the plant in the event it is moved to a new location, absent an express provision that they do not?

Question No. 4

Whether, under the federal law of collective bargaining contracts, the seniority-recall rights granted employees by a contract are "vested rights" that survive the termination of the contract, in the absence of an express provision that they do not?

STATUTE INVOLVED

The statute involved is Section 301(a) of the Labor Management Relations Act, 61 Stat. 156 (1947), 29 U.S.C. §185(a) (1952):

> Section 301 (a). Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

The Facts

The events that lead up to this action began in January of 1961. Respondent, Ross Gear and Tool Company, Inc. (hereinafter called the Company) is a manufacturer of steering gears with plants in the United State, England, France, Brazil, Austria, Germany and Spain (*infra,* p. 36).

At that time it had two plants in the United States, one in Lafayette, Indiana, and the other in Detroit, Michigan (hereinafter called the Detroit plant) (*infra*, p. 36). At the Detroit plant the Company manufactured steering gears for such customers as Ford Motor Company, Chrysler Corporation, American Motors Coroporation, and International Harvester Company (R. 3a, 29a). It employed approximately 725 seniority employees there (R. 2a).

Petitioners are five seniority employees who worked for the Company at the Detroit plant.

The Company and its predecessor at the Detroit plant had had collective bargaining contracts with the UAW (hereinafter called the Union), since 1936 (*infra*, p. 36); R. 80a). The contract in effect in January of 1961 had been entered into December 19, 1958, and had as its expiration date October 1, 1961 (*infra*, p. 36).

On January 19, 1961, the Company, in a series of notices to its Detroit employees, began warning that it was building a new plant facility in Lebanon, Tennessee, and that it was going to transfer an as yet undertermined number of operations out of the Detroit plant to the Lebanon facility.

At a Company-Union meeting of March 9, 1961, the Union, after finding there were no incentives it could offer the Company that would make it abandon the move, pressed the Company to honor at Lebanon the seniority of the Detroit employees laid off by the move. The Company rejected this idea, explaining that in return for a subsidized plant facility and other advantages promised by the city of Lebanon, it had agreed to hire its work force for the new facility from the Lebanon area (*infra*, pp. 39-40; R. 5a, 31a, 72a).

On March 28, 1961, the Court of Appeals for the Second Circuit decided *Zdanok v. Glidden*,[2] holding that, in the absence of an express provision in the contract to the contrary, the seniority-recall rights employees earn at a plant continue to adhere to it in the event it is moved, and that, in the absence of an express provision to the contrary, those rights are "vested" rights which survive the termination of the company-union contract.

On May 9, 1961, the Union wrote the Company calling its attention to the *Glidden* decision and threatening legal action if the Company did not honor at Lebanon the seniority-recall rights of the Detroit employees laid off by the move by recalling them at Lebanon in accordance with their seniority (*infra*, p. 40).

The Company did not reply to the Union's letter. Instead, on May 22, 1961, it posted a notice announcing that it was moving not just *some* of the operations of the Detroit plant to Lebanon, but the *entire* Detroit plant. The notice stated that the move would begin by July 1, 1961, and that operations of the Detroit plant would be discontinued on or about September 2, 1961 (*infra*, pp. 40-41).

The Proceeding Before the District Court

On June 15, 1961, the Petitioners commenced this action in the United States District Court for the Eastern District of Michigan (*infra*, p. 35). The Petitioners brought the action for themselves and on behalf of the approximately 716 other seniority employees at the Detroit plant (*infra*,

---

[2] 288 F. 2d 99 (2d Cir. 1961), *cert. granted on other grounds*, 368 U. S. 814.

pp. 35-36).[3] (Hereinafter the five Petitioners and the approximately 716 other employees will be referred to together as the Employees). The Employees claimed that the Company, in taking the position that it would not recall them from layoff when it resumed the operation of the Detroit plant at Lebanon, was threatening to breach their seniority-recall rights. They prayed for a declaratory judgment, a preliminary injunction, and such other additional remedies as might be appropriate by the time of final hearing (*infra*, p. 36; R. 7a-8a).

Since the employees were claiming on what might be considered their "uniquely personal" seniority rights[4] they sought to head-off any *Westinghouse*[5] problem by basing jurisdiction on diversity, rather than Section 301(a) of the Labor Management Relations Act.[6] (The Company is an Indiana corporation, the Employees are citizens of Michigan, and the amount in controversy exceeds $10,000. (*infra*, p. 36; R. 22)).

The Company raised two defenses. First, that the Employees' seniority-recall rights could be exercised only within the city limits of Detroit and, so, not at Lebanon, Tennessee. Second, that even if the rights did apply at Lebanon they would expire upon the termination of the Company-UAW contract on October 1, 1961 (*infra*, p. 41).

The district court, in an opinion filed July 5, 1961, rejected both these arguments. With respect to the argu-

---

[3] The average age of the Detroit plant seniority employees at the time this action was commenced was 48. Their average seniority was 14 years, although one of them had 42 years (R. 4a, 30a).

[4] *IAM Local Lodge 2040 v. Servel, Inc.*, 268 F. 2d 692 (7th Cir. 1959), *cert. denied*, 361 U. S. 884.

[5] *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation*, 348 U. S. 437.

[6] 61 Stat. 156 (1947), 29 U. S. C. §185 (a) (1952).

ment that the Employees' seniority-recall rights applied only at Detroit and not at Lebanon the court said:

> "The Gemmer Division [Detroit] plant is the same plant wherever it is moved, in spite of the fact it might be known by a different name. Mere change of form will not change the substance, nor will mere change of location. This is the same plant, same machinery and equipment, same operation, same officers and supervisors, but in a new climate. The benefits created for the employees under that contract should not be said to be unilaterally terminated by mere change of location." (*Infra*, p. 58).

As to the second argument, that even if the Employees' seniority-recall rights *did* apply at the Lebanon facility they would be cut off on October 1, 1961, with the termination of the contract, the district court said:

> "The mere fact that there is a termination date in a collective bargaining agreement does not terminate all the rights and benefits of the employees under that agreement, but merely designates a certain time agreed upon by the parties when there would be further negotiations concerning those rights and benefits. Therefore the fact that this agreement in question has a termination date does not automatically remove all of the rights and benefits previously acquired by the employees. Although, as in this case, the agreement itself with the union as a bargaining agent might have been terminated by the move to Lebanon, the rights and benefits that have accrued to the individual employees persist and cannot be unilaterally denied by the employer without the employees' consent. Among these rights and benefits would be included the right of seniority, as more specifically involved in this case, *the right to be rehired by the employer after a lay-off, as stated in the contract.*" (*Infra*, p. 58).

On July 7, 1961, an order declaring the rights of the parties in accordance with the views expressed in the district court's opinion was entered (*infra*, p. 43).

On July 26, 1961, the Company filed a notice of appeal to the United States Court of Appeals for the Sixth Circuit (R. 125a).

The Proceeding Before the Court of Appeals

Before the court of appeals, the Employees' claim, on the relocation branch of the case, was as follows: Under the seniority article of the collective bragaining contract they had seniority-recall rights at the Detroit plant. A section of the seniority article listed the circumstances under which those seniority-recall rights could be lost and relocation of the plant was not one of the listed circumstances.[7] Therefore, they argued, their seniority rights

---

[7] "31. An employee shall lose his seniority and his name shall be removed from the payroll of the Company for all purposes for the following reasons:

(a) If he quits.

(b) If he is discharged and not reinstated through the grievance procedure.

(c) If he has been laid off for a period of twelve (12) consecutive months; provided, however, that no employee shall lose his seniority under this sub-paragraph who has seniority of one year or more at the time of his layoff.

(d) If for any reason he is absent from work for a period of five (5) working days without notifying the employment office of the Company during such period.

(e) If when notified by the Company by registered mail to report for work, after layoff, he fails to report within three (3) working days after receipt of such notice.

(Continued on next page)

at the plant were not cut off by its relocation and they could exercise them at Lebanon. They relied heavily on *Glidden*.

The court of appeals agreed that the seniority article of the contract gave the Employees seniority-recall rights at the Detroit plant (*infra*, pp. 42-43). Without any further

---

(Continued from preceding page)

(f) If he gives a false reason for obtaining a leave-of-absence or overstays any such leave more than three (3) working days.

(g) If he receives permanent total disability benefits under a group insurance policy held by the Company. If he ceases to receive such benefits and is re-employed, his seniority, including that which he otherwise would have acquired during the period of his disability, shall be restored.

(h) If he retires and receives a pension under the provisions of the Pension Agreement. If he receives a pension for permanent total disability and is re-employed, his seniority including that which he otherwise would have acquired during the period of his disability, shall be restored.

(i) If he accepts a separation payment under the Supplemental Unemployment Benefit Plan incorporated in this agreement, in which event his seniority shall terminate on the date on which payment of such separation payment is issued by the Company.

(j) As an exception to subparagraphs (d), (e), and (f) above, an employee shall not be deprived of his seniority when his failure to report for work is caused by sickness, injury, accident or other justifiable cause and notice is given the employment office of the Company at the earliest practical time and the employee returns to work as soon as practical. Notice must be by registered mail, telegram, telephone, or other proper and accepted means of communica- subject to verification. The management and the shop committee shall determine the justice of claim that the employee had good reason to fail to report for work. For the purpose of this subparagraph, paragraph 48 shall not apply." (Pp. 21-23 of the collective bargaining contract of 1958 which is bound into the Certified Record after R. 125a; see R. 9a.)

discussion of the seniority article, however, the court turned to the recognition clause of the contract which reads as follows:

> "The Company recognizes the union as the exclusive representative of its employees in its plant or plants which are located in that portion of the greater Detroit area which is located within the city limits of Detroit for the purpose of collective bargaining on matters of wages, hours and conditions of employment, excluding those mentioned in the next succeeding paragraph." (*Infra*, p. 42).

The court fastened onto the language, "plant or plants which are located in that portion of the greater Detroit area which is located within the city limits of Detroit" and held that it prevented the Employees from having seniority-recall rights at Lebanon (*infra*, p. 44-45). The court rejected the concept, applied in *Glidden* and by the district court, that since the plant at the new location was not a *different* plant but merely the old plant in a new location, the Employees' seniority-recall rights continued to adhere to it (*infra*, pp. 44-45).

On the contract termination branch of the case the Employees relied upon the *Glidden* rule that the seniority-recall rights of employees are "vested" rights that do not terminate with the contract between the company and the union. They pointed out that the section of the seniority article which listed the circumstances under which seniority-recall rights are lost provided that a laid-off employee (which all of them would be when the Detroit plant left Detroit for Lebanon) lost his seniority,

> "(c) If he has been laid off for a period of twelve (12) consecutive months; provided, however, *that no employee shall lose his seniority under this subparagraph who has seniority of one year or*

more at the time of his layoff." (Emphasis supplied).[8]

The court failed to rule on the matter.

The court had granted leave to the Michigan Manufacturer's Association to file a brief *amicus curiae*. In its brief the Association argued that state law applied to the case.[9] In its reply brief the Employees argued that the federal law of collective bargaining contracts applied.[10] It would appear from the cases cited by the court (*infra*, p. 45) that it applied a Michigan common law rule of commercial contracts[11] which is also applied in Indiana,[12] West Virginia,[13] and New Jersey.[14]

REASONS FOR GRANTING THE WRIT

In *Lincoln Mills*[15] the Court instructed the lower courts to fashion a federal law of collective bargaining contracts to be applied to the rights and duties made federal by Section 301(a) of the Labor Management Relations Act.[16]

---

[8] See note 7, *supra*, p. 8.

[9] Brief for Michigan Manufacturers' Association, Amicus Curiae, pp. 42-48.

[10] Reply Brief for Plaintiffs-Appellees, p. 35. n. 10.

[11] *Standard Oil Co. v. Ogden & Moffett Co.*, 242 F. 2d 287 (6th Cir. 1957).

[12] *Jenkins v. King*, 244 Ind. 164 (1946).

[13] *Babcock Coal & Coke Co. v. Brackens Creek Coal Land Co.*, 128 W. Va. 676 (1946).

[14] *Dura Electric Lamp Co. v. Westinghouse Electric Corp.*, 249 F. 2d 5 (3d Cir. 1957).

[15] *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448.

[16] 61 Stat. 156 (1947), 29 U.S.C. §185(a) (1952).

The four questions presented by this case are questions in this new body of federal law.

On two of them (Question Nos. 2 and 3) the decision of the court below is in conflict with the Second Circuit's decision in *Zdanok v. Glidden Co.*[17] and the Third Circuit's decision in *Metal Polishers Union v. Viking Equipment Co.*[18]

Question No. 1 is the most basic of the four. It asks: whose rights and duties under collective bargaining contracts were made federal by Section 301(a)[19]—just *unions'* and *employers'*, or the individual rights and duties of *employees* as well? If the latter is the case then the Court's *Westinghouse*[20] decision no longer applies and the jurisdiction of the district courts under Section 301(a) must be substantially expanded.

The other three questions deal not with the scope of the new federal law but with its specific content. The Court is asked to review three general rules of collective bargaining contract interpretation (on two of which there is a conflict in the Circuits, as indicated above) and decide whether or not these rules should be included in the new

---

[17] 288 F. 2d 99 (2d Cir. 1961). On October 9, 1961, this Court declined to review the decision in *Glidden*, limiting its grant of certiorari to the question of participation by a Court of Claims judge. 368 U.S. 814. On June 25, 1962, this Court affirmed the judgment of the Second Circuit. 370 U.S. 537. On October 8, 1962, this Court denied a motion for leave to file an out-of-time petition for rehearing.

[18] 278 F. 2d 142 (3d Cir. 1960).

[19] 61 Stat. 165 (1947), 29 U.S.C. §185(a) (1952).

[20] *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 438 U.S. 437.

federal law. Question No. 2 involves a general rule of recognition clause interpretation and Questions No. 3 and 4 involve general rules of seniority provision interpretation.

The Court has reviewed some general rules of collective bargaining contract interpretation fashioned by the courts in response to the instruction of *Lincoln Mills*. Thus far, however, the review has reached general rules for only a few of the many provisions typically included in collective bargaining contracts. The Court has reviewed a number of rules of arbitration clause interpretation,[21] one rule of welfare plan provision interpretation[22] and two rules of no-strike clause interpretation.[23] In this case we ask the Court to review general rules of interpretation for two of the most basic provisions found in all collective bargaining contracts; the recognition clause and the seniority provision.

Questions No. 2, 3 and 4 are of great practical significance because they arise out of the plant relocation situation. At present the United States is experiencing a wave of such relocations, nearly all of which raise difficult ethical, sociological, and legal problems.[24] It is important to employees, employers, and union that they have a clearer idea of what their rights and duties are in these difficult situations.

---

[21] *United Steel Workers v. American Manufacturing Co.*, 363 U.S. 564; *United Steel Workers v. Warrior & Gulf Nav. Co.*, 363 U. S. 574; *Local 174, Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95; *Drake Bakeries, Inc., v. Local 50 American Bakery and Confectionary Workers*, 370 U.S. 254; *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238.

[22] *Lewis v. Benedict Coal Corp.*, 361 U.S. 459.

[23] *NLRB v. Lion Oil Co.*, 352 U.S. 282; *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270.

[24] E. g., Oberer, *The Corporation and the Rank-File Employee*, 343 Annals 95 (1962); 110 U. Pa. L. Rev. 458 (1962); Note, *Vested Rights in the Runaway Shop*, 13 W. Res. L. Rev. 360 (1962); Aaron, *Reflections*

(Continued on next page)

Many of the legal problems that have been generated by plant relocations have already come before the lower federal and state courts and arbitrators and are on their way through the appellate procedures. At present, the courts and arbitrators are going in both directions, some following the *Glidden* and *Viking* decisions[25] and some following the Sixth Circuit's decision in the instant case.[26] It is important, therefore, that this basic conflict be settled before more confusion arises.

As to Question No. 1—In *Lincoln Mills* the Court held that under Section 301 (a) of the Labor Management Relations Act the rights of *unions* under collective bargaining contracts are federal rights for which the courts are to fashion a federal law of collective bargaining contracts.

Are the individual rights of *employees* under collective bargaining contracts also federal rights for which federal law is to be fashioned?

1. The seed of the question was sown in *Westinghouse*, brought to flower in *Lincoln Mills*, and not dealt with (be-

---

(Continued from preceding page)
on the Legal Nature and Enforceability of Seniority Rights, 17 Harv. L. Rev. 1532 (1962); Lowden, *Survival of Seniority Rights Under Collective Bargaining Contracts: Zdanok v. Glidden Co.*, 48 Va. L. Rev. 201 (1962); Comment, 61 Colum. L. Rev. 1363 (1961); U. S. News & World Report, Dec. 21, 1959, p. 89; U. S. News & World Report, Aug. 7, 1961, p. 81; Commonweal, Sept. 22, 1961, p. 4; Krock, *Issue of Judicial Power to Rewrite Labor Contract*, N. Y. Times, Aug. 18, 1961, p. 20, col. 3; Krock, *Jobs as "Vested Rights" Despite Location Changes*, N. Y. Times, July 21, 1961.

[25] E. g., *Panza v. Armco Steel Corp.*, 51 LRRM 2016 (W. D. Pa. 1962); *Fried et al. v. Glenn Elec. Heater Corp.*, 198 F. Supp. 249 (D. N. J. 1961); *Selb Manufacturing Co.*, 37 Lab. Arb. 834, *enforced sub nom IAM v. Selb*, 49 LRRM 2366 (E. D. Mo. 1961), *affirmed sub nom Selb v. IAM*, 305 F. 2d 177 (8th Cir. 1962).

[26] E. g., *Union Packers, Inc.*, 38 Lab. Arb. 619 (1962); *Philips Chemical Co.*, 39 Lab. Arb. 82 (1962); *H. H. Robertson Co.*, 37 Lab. Arb. 928 (1962); *Sangamo Electric Co. v. Bradley*, 46 L. C. Par. 17843 (App. Ct. of Ill. 1962).

cause not squarely posed) in *Dowd Box*,[27] *Lucas Flour*[28] *Atkinson v. Sinclair Refining Co.*,[29] or *Glidden Co. v. Zdanok*.[30] This case poses the question squarely for it is an action by individual employees asserting important individual rights (seniority-recall rights). It presents the Court with an opportunity to meet the question head-on and settle it.[31]

Westinghouse distinguishes between rights granted the union under a collective bargaining contract and those granted the individual employees covered by it.[32] The Court indicated that neither groups of rights had been made federal by Section 301 (a) since that section created no substantive rights but merely granted the federal courts jurisdiction over certain cases arising out of collective bargaining contracts, to which cases, the Court indicated, the federal courts were to apply state law.[33] Under this analysis the jurisdiction conferred by Section 301 (a) included only suits brought by unions enforcing their own

---

[27] *Dowd Box Co. v. Courtney*, 368 U.S. 502.

[28] *Local 174, Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95.

[29] 370 U.S. 238.

[30] 370 U.S. 530.

[31] The fact that the instant case came before the federal district court on diversity jurisdiction rather than Section 301 (a) jurisdiction should not preclude the Court's consideration of Section 301 (a) questions. In both *Dowd Box* and *Lucas Flour* the actions in the state courts were not based on Section 301 (a) but on the state courts' traditional jurisdiction to decide contract cases. But this Court considered the Section 301 (a) questions raised by those cases. Similarly, in *Atkinson v. Sinclair Refining Co.*, Count II of the complaint filed in federal court was based on diversity jurisdiction and not on Section 301 (a).

[32] 348 U.S. at 460.

[33] *Id.* at 449.

rights but not those in which unions, or the individual employees themselves, were seeking enforcement of the employees' individual rights.[34]

In *Lincoln Mills* the Court departed from the *Westinghouse* premise that Section 301 (a) was merely jurisdictional and ruled that it made rights under collective bargaining contracts federal rights (enforceable under a federal statute) for the enforcement of which the courts were to fashion a federal law of collective bargaining contracts.[35]

But there remains a question as to *whose* rights were made federal by Section 301 (a). *Lincoln Mills* involved a union right (the right to have the employer perform his promise to arbitrate) and established that particular union right as within the scope of the Section. But, in a footnote, Justice Douglas acknowledged the *Westinghouse* distinction between union rights and the individual rights of employees but without indicating whether the latter, like the former, have been reached by the federalizing action of the Section.[36]

---

[34] *Id.* at 460. Justice Frankfurter reasoned that even though suits by unions did not involve federal rights (since Section 301 granted none) such suits nevertheless could be considered embraced within Article III, Section 2 of the Constitution because of the intimate relationship between unions and a federal statute, the Labor Management Relations Act. *Id.* at 45. He did not believe, apparently, that the same could be said for suits involving only the individual rights of employees.

[35] "It is not uncommon for federal courts to fashion federal law where federal rights are concerned." 353 U.S. at 457.

[36] "[*Westinghouse*] is quite a different case. There the union sued to recover unpaid wages on behalf of some 4000 employees. The basic

(Continued on next page)

Lincoln Mills made union rights under a collective bargaining contracts federal rights under Section 301 (a) but left unanswered the question of whether individual rights are also cognizable under the Section.

Nor have any of the Court's subsequent Section 301 (a) decisions answered the question, although some have come very close to it.

In *Dowd Box* the employer repudiated a recently negotiated contract claiming that its representative had been acting without authority so that the resulting contract was invalid. Officers of the local and international union brought an action in state court for a declaration that the contract had been effectively executed and so was valid and binding and for an accounting and damages for wages called for under the contract but not paid.[37]

The employer unsuccessfully argued to the trial court and the Supreme Judicial Court of Massachusetts that since the action was on a collective bargaining contract the federal courts had exclusive jurisdiction over it under Section 301 (a). This Court, in addressing itself to the case, assumed without deciding that the case was one which could properly be brought in federal court under Section 301 (a) and went straight to the question of whether, this being so, the state court was possessed of concurrent jurisdiction over it.[38] The Court decided that it was.

(Continued from preceding page)

question concerned the standing of the union to sue and recover on those individual employment contracts. The question here concerns the right of the union to enforce the agreement to arbitrate which it has made with the employer." 353 U.S. at 456, note 6.

[37] 368 U.S. at 504.

[38] "We start with the premise that nothing in the concept of our federal system prevents state courts from enforcing rights created by federal law." *Id.* at 507.

It appears to have been assumed by this Court, without reference to *Westinghouse*, that the action was within the Section 301 (a) jurisdiction of the district court. As indicated, one of the plaintiffs' claims was for wages owed but not paid the individual employees. The right to wages is an individual right, as the Court made clear in *Westinghouse*. Therefore, had the Court in *Dowd Box* actually *decided* either "*Yes*", that a claim for wages *is* within the scope of Section 301 (a), or "*No*", that it is *not*, the question of whether the individual rights of employees are included within the Section's coverage would have been answered.

Lucas Flour began as an action in state court by an employer against a union for breach of a no-strike clause. The question the case brought to this Court was whether or not state courts (in exercising their concurrent jurisdiction over suits which could properly be brought under Section 301 (a) must apply the federal law of collective bargaining contracts. The Court said they must.

In some quarters this ruling is regarded as an answer to the question of whether the individual rights of employees are included among the rights made federal by Section 301 (a). The reasoning involved is as follows: If the state courts have to apply the federal law in collective bargaining contract cases coming before them, then the federal courts have to apply it in exercising diversity jurisdiction. Since the cases coming before the federal courts on diversity jurisdiction are the individual rights cases that have been frightened there by *Westinghouse* this means the federal law applies to such cases and individual rights must be covered by Section 301 (a).

The error in this line of reasoning is that this Court has not yet said to the state courts that they must apply the

federal law in *all* collective bargaining contract cases regardless of whose rights are involved. Instead, it has merely instructed them to apply the federal law in "suits of a kind covered by Section 301 (a)".[39] As yet, however, it has not decided whether suits on the individual rights of employees are suits of that kind.

In *Atkinson v. Sinclair*, the Court again came very close to the question. The case involved an action in federal court by an employer against a union and union officers for breach of a no-strike clause. Count I of the complaint was against the union and the Court ruled it was within Section 301 (a). Count II was against individual union officials and was based on diversity jurisdiction, the employer apparently having been apprehensive that if he tried Section 301 (a) jurisdiction he might be ousted on the ground that individual duties cannot be enforced under the Section. This Court, however, concluded that since Count II was against union officials it was really against the union like Count I. Since it was against the union, the Court continued, it was within Section 301 (a) and under that section it did not state a cause upon which relief could be granted since the federal law of collective bargaining contracts includes Section 301 (b) which clearly provides that a union's liability cannot be shifted to its officials.[40]

However, as the Court indicated in a footnote, had Count II been aimed at the duties of individual employees who were *not* acting in a union capacity, there would have been a question as to whether or not the Count was within Section 301 (a).[41] In that footnote, therefore, as in the *Lin-*

---

[39] 369 U.S. at 103.

[40] 370 U.S. at 246-48.

[41] "In reaching this conclusion, we have not ignored the argument that Count II was drafted in order to anticipate the possible union defense under Count I that the work stoppage was unauthorized by the

(Continued on next page)

coln Mills footnote, the Court continued the distinction between union rights and duties and the rights and duties of individual employees. Again the Court acknowledged that there is a question as to whether or not the latter are included within the coverage of Section 301 (a).

Finally, in *Glidden Co. v. Zdanok*, the Court again (and again in a footnote) raised the question of whether or not suits on the individual rights of employees are within Section 301 (a).

As will be developed in greater detail *infra*, *Glidden* is almost identical in its facts to the instant case. The employer moved its plant from New York to Pennsylvania and refused to honor the seniority-recall rights of the New York employees when it resumed operations in Pennsylvania. Five of the New York employees filed suit in federal district court for damages for breach of their seniority-recall rights. The suit was not founded on Section 301 (a) jurisdiction but on diversity. The district court denied relief,[42] and the Court of Appeals for the Second Circuit reversed.[43]

The employer petitioned for certiorari, asking the Court to review the merits of the case and the constitutional question of whether or not a Court of Claims judge can sit on a Court of Appeals. The Court granted the writ as to only

---

(Continued from preceding page)

union, and was a wildcat strike led by the 24 individual defendants acting not in behalf of the union but in their personal and non-union capacity. The language of Count II contradicts the argument, however, and *we therefore do not reach the question of whether the count would state a proper §301 (a) claim if it charged unauthorized, individual action.*" 370 U.S. at 249, note 7. (Emphasis supplied).

[42] 185 F. Supp. 441 (S.D. N.Y. 1960).

[43] 288 F. 2d 99 (2d Cir. 1961).

the latter question.[44] In its decision the court noted that the Second Circuit had applied state law to the collective bargaining contract question that was before it on diversity jurisdiction.[45] In a footnote, the court indicated that had its grant of certiorari included a review of the merits it would have faced the question of whether the Second Circuit was right in applying state rather than federal law.[46] It would appear that the Court was considering that while the facts that the case was in federal court on diversity jurisdiction suggested the application of state law, the fact that the suit was on the individual rights of employees under a collective bargaining contract suggested federal law.

It remains unclear, we respectfully submit, whether the rights and duties made federal by Section 301 (a) include the individual rights of employees as well as those of unions. We petition the Court, therefore, to take this question out of the footnotes and decide it.

2. It is important to the lower federal courts that the question be settled. If *Westinghouse* no longer applies and suits on individual rights can be brought under Section 301 (a), the lower courts will have to expand their jurisdiction as they are presently exercising it. Thus far, almost without exception, they have disclaimed Section 301 (a) jurisdiction over such suits.[47]

---

[44] 368 U.S. at 814.

[45] 370 U.S. at 537.

[46] "Under our limited writ of certiorari, 368 U.S. 814, we have no occasion to consider whether federal law was more appropriately the measure of the employer's obligation. Cf. *Teamster's Local 174 v. Lucas Flour Co.*, 369 U.S. 95." 370 U.S. at 537, note 8.

[47] *United Steelworkers v. Pullman Standard Car Mfg. Co.*, 241 F. 2d 547 (3d Cir. 1957); *Textile Workers Union v. Bates Mfg. Co.*, 158 F.

(Continued on next page)

3. We believe that if the Court addresses itself to this question it will rule that the individual rights of employees, as well as all other rights under collective bargaining contracts, are federal rights under Section 301 (a).

As to Question No. 2—Whether, under the federal law of collective bargaining contracts (and as the court below decided, in conflict with the Second Circuit's *Glidden* decision and the Third Circuit's *Viking* decision) the recognition clause (or preamble) of a contract delineates the geographic area within which the employees can exercise their seniority-recall rights?

1. This is an important question in the federal law of collective bargaining contracts which has not been, but should be, answered by this Court.

Virtually all collective bargaining contracts have recognition clauses.[48] It is a long standing axiom that the function of such clauses is to describe the bargaining unit

---

(Continued from preceding page)

Supp. 410 (D. Me. 1958); *Textile Workers Union v. Williamsport Textile Corp.*, 138 F. Supp. 407 (M. D. Pa. 1955); *Local 180, UAW v. J. I. Case Co.*, 185 F. Supp. 130 (E.D. Wis. 1960); *Local 2040, Int'l. Ass'n of Machinists v. Servel, Inc.*, 268 F. 2d 692 (7th Cir. 1959), *cert. denied*, 361 U.S. 884; *Kosley v. Goldblatt Bros., Inc.*, 251 F. 2d 558 (7th Cir. 1958), *cert. denied*, 357 U.S. 904; *ILGWU v. Jay-Ann Co.*, 228 F. 2d 632 (5th Cir. 1956); *Communications Workers v. Ohio Bell Tel. Co.*, 160 F. Supp. 822 (N.D. Ohio 1958), *affirmed*, 265 F. 2d 221 (6th Cir. 1959), *cert. denied*, 361 U.S. 814; *Garfield Local 13-556, Oil Workers Union v. Heyden Newport Chem. Corp.*, 172 F. Supp. 230 (D.N.J. 1959); *Giba v. IUE*, 50 LRRM 2299 (D. C. Conn. 1962); *Consolidated Laundaries Corp. v. Kraft*, 185 F. Supp. 631 (S.D. N.Y. 1960). *Contra, Fried v. Glenn Electric Heater Corp.*, 198 F. Supp. 248 (D.N.J. 1961).

[48] 2 BNA *Collective Bargaining Negotiations and Contracts (Basic Patterns in Union Contracts)* 70:61 (1960).

represented by the union and covered by the contract.[49] The Sixth Circuit's rule in the instant case that such clauses delineate the geographic area within which employees can exercise their seniority-recall rights, rather than simply describe the bargaining unit, is, therefore, a clear departure from well settled concepts as to the nature and function of such clauses. A rule which would have such a drastic and wide-spread effect upon existing collective bargaining contracts should be reviewed by this Court before it becomes a rule of the federal law of collective bargaining contracts.

The novelty of the Sixth Circuit's rule can be seen by what happened in this case. The Employees relied on the seniority article of the contract, which gave them seniority-recall rights at the Detroit plant and which did not include plant relocation as one of the circumstances that cut off those rights (see pp. 8-9, *supra*). In dealing with this

[49] "*Recognition clauses often identify the employees covered by the contract* in general terms such as 'production and maintenance employees' or 'hourly-paid employees' or the unit certified by the NLRB. Occasionally *the unit is identified* as being composed of employees whose jobs and rates are listed in the agreement." (Emphasis supplied). *Id.* at 70:121 (1960).

"Recognition clauses, which appear in virtually all union contracts, generally have two parts: designation of the union as the exclusive bargaining agent *for the employees covered by the agreement and a description of the type of employees covered.*" (Emphasis supplied). *Id.* at 70:61.

"Under the Taft Act, the business of writing recognition and related clauses has become largely routine—for two main reasons: first, the union representing a majority of employees in the appropriate *bargaining unit* must be recognized as the exclusive bargaining agent; and second, *coverage of the contract* is fixed to a large degree by the NLRB's determination of the appropriate *bargaining unit.*" (Emphasis supplied). *Id.* at 70:1.

For cases in which courts, the NLRB, and arbitrators have had recourse to the recognition clause's function of describing the bargaining unit, see e. g., *IAM Local 1912 v. United States Potash Co.*, 270 F. 2d 496, 499 (10th Cir., 1959); *cert. denied*, 363 U.S. 845, and the cases cited at 499; *Lewis v. Fentress Coal & Coke Co., Inc.*, 160 F. Supp. 221 (M. D. Tenn. 1958), *affirmed* 264 F. 2d 134 (6th Cir. 1959); *Sterling Faucet Co.*, 119 NLRB 1225 (1950); *Tom Thumb Stores, Inc.*, 123 NLRB 833 (1959); *Tacoma Printing Pressmen's Union*, No. 44, 131 NLRB 1090 (1961); *Loew's Inc.*, 32 L. A. 740 (1959). See also *United Steel Workers v. New Park Mining Co.*, 273 F. 2d 352 (10th Cir. 1959).

claim the court of appeals virtually ignored the seniority article and turned instead to the recognition clause:

> "The Company recognizes the union as the exclusive representative of its employees in its *plant or plants which are located* in that portion of the greater Detroit area which is located *within the city limits of Detroit* for the purpose of collective bargaining on matters of wages, hours and conditions of employment, excluding those mentioned in the next succeeding paragraph." (*Infra*, p. 42; emphasis supplied).

The Court held that the phrase "plant or plants which are located * * * within the city limits of Detroit" limited the employees' seniority-recall rights to the city limits.

Plainly this language has but one function: to describe the bargaining unit of employees represented by the Union and, so, covered by the contract. It describes the unit as consisting of the employees in the Company's plant or plants located within the city limits of Detroit. The reference to "plant or plants" rather than just "plant" (since the Company had only one plant within the city limits) is a provision for the automatic expansion of the bargaining unit to include any additional plants the Company might build or acquire within the city limits during the term of the contract. Such provisions are typical.[30]

The only thing the recognition clause has to say about seniority-recall rights (as well as all other employee rights granted by the contract) is who gets them—namely, the employees in the bargaining unit described in the recognition clause. The substance of the rights themselves is described in the seniority article.

The Sixth Circuit's concept that the recognition clause not only describes the bargaining unit but, in addition, de-

---

[30] "Recognition of the union in new plants is sometimes mentioned in contracts. *Recognition may be automatic in plants established within a specified area*—or it may be negotiable." (Emphasis supplied). 2 BNA *Collective Bargaining Negotiations and Contracts (Basic Patterns in Union Contracts)* 70:61 (1960).

lineates the geographic area within which the employees' seniority-recall rights can be exercised is indeed an innovation.[51] We have not discovered another case in which a judge or arbitrator even intimated that the clause has this additional function. The novelty of the rule is suggested by the fact that the court did not cite a single authority in support of it.

2. Not only is the Sixth Circuit's rule a clear departure from settled principles, but it is in conflict with the Second Circuit's decision in the *Glidden* case and the Third Circuit's decision in *Metal Polishers Union v. Viking Equipment Co.*[52]

In *Glidden* one of the company's two defenses was the recognition clause of the contract, which included by reference a geographic description set out in the preamble. The preamble and recognition clause read as follows:

> "This Agreement Made and Entered into at New York, New York, by and between the Glidden Company, Durkee Famous Foods Division, *for and on behalf of its plant facilities located at Corona Avenue and 94th Street, Elmhurst, Long Island, New York*, hereinafter referred to as the 'Company', and General Warehousemen's Union, Local 852, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

---

[51] What if, for example, the seniority article granted employees laid off at the Detroit plant preferential hiring rights at the Company's Lafayette plant (which is covered by a completely separate contract)? Under the Sixth Circuit's ruling it would be impossible for Detroit employees to exercise those rights since the plant at which they would be exercising them is not "within the city limits of Detroit."

[52] 278 F. 2d 142 (3d Cir. 1960).

AFL-CIO, hereinafter referred to as the 'Union.'[53] (Emphasis supplied).

"Article I Recognition

"1. The Company recognizes the union as the exclusive representatives of all hourly paid production, maintenance and service employees of the Company at the plant facilities *named above* for the purpose of collective bargaining with respect to rates of pay, hours of employment, fringe benefits, and other terms and conditions of employment." (R. 71a; emphasis supplied).

The company argued that the language "plant facilities located at Corona Avenue and 94th Street, Elmhurst, Long Island, New York" limited the exercise of the employees' seniority-recall rights to that location so that when the plant was moved away from it, the employees' rights could not reach it.

The Second Circuit refused to attribute this function to the recognition clause. As the court put it, the geographic description in the recognition clause was merely the contract's *descriptio personae* (*infra*, p. 70). The court, in this Latin phrase, expressed the traditional concept of the function of recognition clauses and the geographic descriptions typically included in them: to describe the bargaining unit (persons) for whom the employer recognizes the union as the exclusive bargaining agent. As the Second Circuit ruled, in keeping with the traditional view, the geographic description the company relied on simply described the bargaining unit and described it as the employees in the company's "plant facilities located at Corona Avenue and 94th Street, Elmhurst, Long Island, New York."

---

[53] *Zdanok v. Glidden Co.*, 185 F. Supp 441, 448, note 27 (S.D. N.Y. 1960). (*Infra*, p. 67).

In *Metal Polishers Union v. Viking Equipment Co.*, the plant was located in East Orange, New Jersey. During the term of the contract the company shut it down, moved it to Pennsauken, at the other end of the state, and reopened it there. The company took the position that the relocation had cut off all rights under the contract and refused to honor it. The union sued under Section 301 (a) for breach of the contract.

The preamble of the contract read as follows:

> "Agreement entered into this First day of June, 1957, between Viking Company, *doing business in East Orange, and in the State of New Jersey*, hereinafter called the Employer; and Metal Polishers, Buffers, Platers & Helpers' International Union, Local #44, affiliated with the American Federation of Labor, hereinafter called the Union, which Union is entering into this contract on behalf of the Employees thereof now employed and hereafter to be employed by the Employer."[54] (Emphasis supplied).

The District Court, in its Oral Conclusions, found that the geographic description supported the company's contention that the contract rights could be exercised only in East Orange and, therefore, had been cut off by the relocation.

> "In the court's estimation, an examination of the contract leads the court to the conclusion that it is implicit therein that the contract applies to the area in which the company was then doing business. There are a number of things that lead the court to this conclusion. In the first paragraph it says: 'AGREEMENT entered into this First day of June between VIKING COMPANY, doing business in East Orange * * *'"[55]

---

[54] Brief for Plaintiffs-Appellees, p. 25.

[55] *Ibid.*

The Court of Appeals for the Third Circuit, however, took a different view:

> "We disagree with the District Court *in his interpretation of the contract. We do not think it is to be interpreted as applicable only to defendant's activities in East Orange, New Jersey. And we do not think that the defendant brought it to an end by its unilateral action in moving from East Orange to Pennsauken.* * *" (*Infra*, p. 76; emphasis supplied).

The Third Circuit, like the Second, has rejected the Sixth Circuit's rule that the geographic descriptions typically included in the recognition clauses (or preambles) of contracts delineate the geographic area within which rights under the contract can be exercised.

3. We petition the Court to grant certiorari so that this conflict between the Sixth Circuit and the Second and Third Circuits will be resolved and so that the Sixth Circuit's novel rule will be reviewed before it becomes a part of the federal law of collective bargaining contracts.

As to Question No. 3—Whether, under the federal law of collective bargaining contracts (and as the court below refused to hold, in conflict with the Second Circuit's decision in *Glidden* and the Third Circuit's decision in *Viking*) the grant to employees of seniority-recall rights at a particular plant implies that those rights continue to adhere to the plant in the event it is moved to a new location, absent an express provision that they do not?

1. This is an important question in the federal law of collective bargaining contracts which has not been, but should be, decided by this Court.

The question is of great practical importance, for while virtually all contracts grant employees seniority-recall rights at a particular plant, the vast majority do not include provisions as to whether or not those rights are to continue to adhere to the plant if it is moved.

Petitioners urged upon the court below the rule that the grant of seniority-recall rights at a plant implies that the rights adhere if the plant is moved, in the absence of an express provision that they do not. Petitioners pointed to the fact that the contract gives them seniority-recall rights at the Detroit plant; to the fact that the plant at Lebanon is merely the Detroit plant relocated; and to the further fact that the section of the seniority article that lists the circumstances which cut of seniority-recall rights does not include relocation (see pp. 8-9, *supra*).

The court of appeals agreed that the contract gives petitioners seniority-recall rights at the Detroit plant (*infra*, pp. 42-43). It also agreed that the Lebanon plant was merely the Detroit plant relocated.[56] But the Court rejected the rule of implication.[57]

2. While the rule was rejected by the Sixth Circuit, it was applied by the Second Circuit in *Glidden*[58] and by the

---

[56] "It is true, as the District Judge pointed out, that the plant in Tennessee has the same machinery and equipment, the same officers and supervisors, and the same operation * * *." (*Infra*, p. 45).

[57] "The agreement gave seniority and recall-to-work rights to employees in the defendant's plants which were within the city limits of Detroit. It gave no such rights to employees of a plant in Tennessee. * * * *We see no material distinction, with respect to geographical location, between a new plant in Tennessee and the relocation of the Gemmer [Detroit] plant in Tennessee.*" (*Infra*, pp. 44-45; emphasis supplied).

[58] "But one would be obliged to wonder why so catastrophic a consequence should follow a mere change in physical location. And it would be hard to conjure up a reason why it should. * * *

"* * * Contracts must, in all fairness, be construed *ut res magis valeat quam pereat.*" (*Infra*, p. 70).

Third Circuit in *Viking*, where the court held none of the contract rights to have been cut off by the move:

> "We do not think it [the contract] is to be interpreted as applicable only to defendant's activities in East Orange, New Jersey. *And we do not think that the defendant brought it to an end by its unilateral action in moving from East Orange to Pennsauken.*" (*Supra*, p. 28; emphasis supplied).

3. We urge the Court to resolve this conflict and settle the rule.

As to Question No. 4—Whether, under the federal law of collective bargaining contracts, the seniority-recall rights earned by employees under a contract are "vested" rights that survive the termination of the contract, in the absence of an express provision that they do not?

1. This is an important question under the federal law of collective bargaining contracts which has not been, but should be, decided by this court.

Petitioners urged upon the court of appeals the rule that the seniority-recall rights employees earn under a contract are "vested" rights that survive the termination of the contract, in the absence of an express provision that they do not. The court, however, failed to apply the rule.

It is common for the seniority articles of collective bargaining contracts to grant employees recall rights by the term. The following is a typical provision: Employees who are laid off and who have one year of seniority shall retain their right to be recalled from layoff for one year; employees with five or more years of seniority shall retain

their right to be recalled from layoff for two years.[59] Counsel for Petitioners is unaware of any collective bargaining contract which provides expressly whether or not such terms of recall rights are cut off by an intervening termination of the collective bargaining contract. This question, therefore, has wide application to the collective bargaining contracts now in existence.

In the instant case the question of whether or not the employees recall rights would survive the termination of the contract was posed by the relocation situation. The question was: If the employees' recall rights *do* reach the plant

---

[59] "A maximum period of layoff, after which rehiring and seniority privileges are lost, is specified by 63 percent of agreements [included in the 400 agreement sample]. This maximum layoff period is the same length for all employees in 38 percent of contracts, as opposed to 25 percent which vary the period of rehiring rights according to the employee's length of service. Of those with the same period for all, more than two-fifths set one year as the cutoff date on rehiring rights. Another quarter specify two years. The remainder of these provisions are divided about equally among limits of less than a year, a year and one-half, and three years.

"Where the period of rehiring rights is linked to the seniority record, practice is divided. *About two-thirds of the clauses keep employees on rehiring and seniority lists for a period equal to their service with the company, but set a maximum period nevertheless—five years is the most frequent limit set*, with 1, 2 and 3 years appearing slightly less frequently. The others provide periods based on different categories of seniority; for example, employees with three months' service retain rehiring rights for one year, those with one to five years' service for two years, those with over five years' service for three years. About one in 20 provides for retention over a period equal to half of accumulated service credit.

"Registration during layoff to indicate continued desire to return is referred to in 10 percent of agreements. *Some of these extend rehiring and seniority rights indefinitely* as long as the employee regularly notifies the company at set intervals of willingness to return. Others provide that on employee request when the normal cutoff date is reached, he will be kept on the rehiring list for an additional period. (Emphasis supplied). 2 BNA *Collective Bargaining Negotiations and Contracts (Basic Patterns in Union Contracts)* 75: 7-8 (1961).

at the new location, will they nevertheless be cut off by the termination of the contract between the Union and the Company on October 1, 1961? There are, however, many other commonplace situations in which the question is posed and has critical significance. Suppose, for example, that when the collective bargaining contract terminates the employer closes the plant because of bad business. In two years, however, he experiences a change in fortune and decides to reopen it. There is no collective bargaining contract in existence. In manning the plant upon reopening it will the employer be under an obligation to recall those of his old employees whose recall rights are for terms in excess of two years, or will he be at liberty to disregard them and hire completely new employees? The answer depends upon whether or not the employees' seniority-recall rights survived the termination of the contract between the employer and the union.

Another example. A number of the employees are on layoff as of the time the collective bargaining contract between the employer and the union terminates. The employer files a decertification peition with NLRB and the union loses the election. The union is out of the picture and there is no contract. Will the employees who were on layoff as of the time the contract terminated be entitled to be recalled when the employer increases its force, or will they be subject to being replaced by new employees? The answer depends on whether or not the empolyees' recall rights are "vested" rights which survived the termination of the employer-union contract.

In *Glidden* the Court of Appeals for the Second Circuit ruled that the seniority-recall rights which employees earn under a contract between their employer and the union are "vested" rights and are not cut off by the intervening

termination of the contract.[60] We believe the rule applied by the Second Circuit but not applied by the Sixth should be the settled rule of the federal law of collective bargaining contracts and urge the Court to grant certiorari so that the rule may be reviewed and adopted as the federal rule.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

HAROLD A. CRANEFIELD,
Counsel for Petitioners.

GORDON A. GREGORY,
JOHN A. FILLION,
ROBERT S. ROSENFELD,
Of Counsel.

Dated: October 13, 1962.

[60] The *Glidden* rule was recently followed by the NLRB in *Bethlehem Steel Co.*, 50 LRRM 1013, 1015 (1962). The Board reasoned that since seniority rights survive the termination of the contract an employer is under a duty to continue honoring them from the termination of the contract to such time as an impasse in bargaining or agreement is reached.

APPENDIX A

OPINIONS BELOW

OPINION OF THE COURT OF APPEALS, 305 F. 2d 143 (1962)

James Oddie, Edward Cwiertniewicz
John Penzak, Oscar King, Harry C.
Bremmer, Plaintiffs-Appellees,

v.

Ross Gear and Tool Company,
Inc., Defendant-Appellant.

No. 14712.

United States Court of Appeals
Sixth Circuit.

July 16, 1962.

SHACKELFORD MILLER, Jr., Chief Judge.

The plaintiffs, who are citizens of the State of Michigan and are employees of the Gemmer Manufacturing Company Division of the defendant, Ross Gear and Tool Company, Inc., an Indiana corporation, are members of Local 80 of the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW (AFL-CIO), hereinafter referred to as the "Union," the bargaining representative for said employees. They filed this action in the District Court on June 15, 1961, on behalf

of themselves and other employees similarly situated for a declaration of rights with respect to their seniority or recall-to-work rights under the collective bargaining agreement then in effect between the Union and the Gemmer division of the defendant. Jurisdiction is based upon diversity of citizenship and the amount in controversy. Section 1332 (a), Title 28, United States Code. McGarry v. Lentz, D.C., 9 F. 2d 680, 683, affirmed, 13 F. 2d 51, C.A. 6th, cert. denied, 273 U.S. 716, 47 S. Ct. 108, 71 L. Ed. 855.

The material facts, which are not in dispute, are as follows. The defendant is a manufacturer of steering gears, with operations in the United States, England, France, Brazil, Australia, Germany and Spain. The Gemmer Manufacturing Company was an independent corporation until 1956 when it was purchased by the Ross Gear and Tool Company. Its plant was located at Detroit, Michigan. Since 1936 the Union has represented the employees at this Detroit plant. Although there were collective bargaining contracts prior to 1948, we are here concerned with only the collective bargaining contracts of 1947, 1951, 1955 and 1958 and the negotiations in connection therewith. The current contract, hereinafter referred to more in detail, was entered into December 19, 1958, and was due to expire on October 1, 1961, several months after this action was filed.

Prior to the filing of this action, the defendant had a plant in Lafayette, Indiana, known as "Ross Gear and Tool Company, Inc." hereinafter called the Lafayette plant, and a plant in Detroit, Michigan, known as "Gemmer Manufacturing Company, a division of Ross Gear and Tool Company, Inc." hereinafter called the Detroit plant. The Detroit plant was located on Mt. Elliott, between Milwaukee and Harper.

On January 13, 1961, the defendant posted a notice to the employees at the Detroit plant, signed by John E. Jarrell, President, reading as follows:

> "TO All Our Employees:
>
> "The Ross Gear and Tool Company has formed a new division: 'The Tennessee Division of the Ross Gear and Tool Co., Inc.'
>
> "This division is building a plant at Lebanon, Tennessee to manufacture new products in addition to some products which are now manufactured at Lafayette and Detroit.
>
> "The pitman arm manufacturing of both Lafayette and Detroit is being transferred to the new division.
>
> "Economic studies are being made on the basis of present and potential business in order to determine if the manufacturing of additional products should be combined in existing divisions or transferred to the new division."

In a letter to defendant dated January 25, 1961, Ken Morris, Co-Director UAW Region 1, stated that the notice of January 13, 1961, had caused much concern on the part of the employees as it pertained to their continued job security. He wrote:

> "Because it is evident that some jobs are leaving the Detroit Plant for the Lebanon Tennessee Plant, we are requesting that any employee affected because of the transfer of a job, be given an opportunity to go to Lebanon with the job.
>
> "We feel you will agree that the long service given by an employee to the company should be allowed to continue if he is willing to follow the operation to the new company location."

He asked for a meeting at the Company's earliest convenience "to reach an understanding on the methods and principle of employees right to transfer with their jobs."

After an exchange of several letters, in which the Company took the position that there was no need for a meeting and that it might be more appropriate to hold such a meeting after the Company had completed certain studies, Morris wrote on February 22, 1961, that if he did not hear from the Company in the next forty-eight hours indicating a willingness to arrange a meeting, the Union would file immediate complaint with the National Labor Relations Board, plus taking such other legal steps necessary to require the Company to bargain in good faith with the organization which represented the Company's employees. By letter of February 27, 1961, the Company agreed to the requested meeting, suggesting the date of March 8, 1961, as the date therefor.

In the meantime, on February 6, 1961, defendant posted a second notice to the employees at the Detroit plant, signed by G. Bissett, who was Vice-President of the Gemmer Division, which referred to recent newspaper and radio stories which suggested that the defendant intended to move its entire Detroit operation to Lebanon. This notice concluded with the following:

> "The economic studies referred to in the January 13 announcement are still in progress. Should these studies indicate the advisability of moving or combining the production of other products, either here or at other plants, you will be advised by Mr. Jarrell or myself."

On March 3, 1961, the defendant posted a third notice to the employees at the Detroit plant, signed by its President, which stated that the purpose of the notice was to

help clarify some of the conflicting rumors which were rampant in the factory and even in the city. The notice stated that in recent years the Company had increasing difficulty in meeting competition to the point where some items were being produced at a price that was not profitable in view of the production costs, and that it was necessary that the management of the Company do everything that could be done to produce the Company's products at the lowest possible production cost; that the former Gemmer Manufacturing Company was having a very unfavorable profit experience when it was acquired by the defendant in 1956, and that while the defendant hoped that it could do much better with Gemmer's facilities than Gemmer had done, this had not proven to be the case, with the exception of one year, and that the rapidly changing economic and competitive conditions in general and those in Gemmer's field in particular, had complicated the situation to such an extent as to make it appear that the Company would never be able to operate profitably in the Detroit plant. It also stated that many Southern states had authorized cities to subsidize the building of new manufacturing plants; that the construction of the new Tennessee plant was being subsidized by the City of Lebanon; that other advantages, such as lower taxes, lower operating costs, and the like, were also offered; that the Company planned that new products would be put in the new plant and that studies would be made to see what other items might be produced there; that the Company was in the process of completing these studies, but did not presently have definite conclusions to announce; that it was a possibility that a major portion of the items then being produced in the Detroit plant would be transferred to the Lebanon plant; and that the Company would consider all the factors carefully and would not cease operations at Detroit if it could be avoided.

The meeting between the defendant and the Union took place on March 9, 1961. At the meeting the defendant did not agree to the Union's request that any employee affected because of the transfer of the job be given the opportunity to go to Lebanon with the job and his seniority rights pertaining thereto. The defendant took the position that employees whose jobs were eliminated would be treated the same as other employees in the past had been treated in job elimination situations, that is, they would be given the rights provided for them in the seniority provisions of the current contract between the Company and the Union; that these employees, consistent with their seniority rights, would be retained at work in the Detroit plant; that the Company did not plan to offer reemployment at the Tennessee Division to the employees whose jobs at the Detroit plant were eliminated, and that in the event employees were laid off as a result of the transfer, the laid-off employees would not be the occupants of the transferred jobs.

On May 9, 1961, Morris wrote to the Company stating that the Company was under a duty to recall at Lebanon employees laid-off in Detroit as a Federal Court of Appeals recently made clear in Zdanok v. Glidden Co., 288 F. 2d 99, C.A. 2nd. He closed this letter by stating:

> "This is to advise you that if you persist in your present determination to breach this duty, legal action will be taken."

On May 22, 1961, the defendant posted a notice to the employees at the Detroit plant, signed by its President, which referred to the establishment of the Lebanon plant and the study which had been given to the overall picture, and advised that, in view of the fact that it had become obvious that the Detroit operation could not be expected

to be a profitable one on a competitive basis, the defendant had decided, with reluctance on the part of its officials, to terminate the Detroit operation of the Gemmer Division of the Company. The notice stated that the Company expected to start the transfer of operations by July 1, 1961, and that on or about September 2, 1961, it expected to discontinue production at Detroit and commence moving the remainder of the production and maintenance equipment.

Thereafter, the plaintiffs filed their complaint in the present action, which set out the foregoing fact and took the position that the seniority rights of the defendant's Detroit employees under the 1958 collective bargaining agreement survived the transfer of defendant's Detroit operations to Lebanon, and that when defendant commenced at Lebanon its operations transferred from Detroit, it would be under a duty to honor at Lebanon the seniority rights of its Detroit employees and recall them to work, in accordance with those rights. They also contended that these seniority rights would continue in existence and would be applicable to operations at the Lebanon plant after October 1, 1961, at which time the current collective bargaining agreement terminated. Defendant by its answer took the position that the 1958 bargaining agreement, under which the plaintiffs claimed the seniority rights in question, was applicable by its express provisions only to the Detroit plant and that, accordingly, it had no application to the operations of the defendant at its plant in Lebanon, Tennessee. The Company also took the position that, even if the collective bargaining agreement was applicable to the Lebanon operations, it was only applicable until October 1, 1961, at which time the bargaining agreement terminated by its express terms.

This presents for consideration the provisions of the collective bargaining agreement which pertain to these opposing contentions. The 1958 agreement, in effect at the time, provides as follows in its opening paragraphs:

"AGREEMENT

"THIS AGREEMENT is entered into this 19th day of December, 1958, by and between GEMMER MANUFACTURING COMPANY (of Detroit, Michigan), which is a division of Ross Gear and Tool Company, Inc. (a corporation of Lafayette, Indiana), and which Gemmer is hereinafter referred to as the 'Company,' and the INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW (AFL-CIO), AND LOCAL 80, THEREOF, hereinafter referred to as the 'Union.'

"WHEREAS, the parties to this agreement desire to promote the spirit of harmony and cooperation between them and insure the most efficient operation of the Company's plant, the following agreement is entered into:

"RECOGNITION

"1. The Company recognizes the union as the exclusive representative of its employees in its plant or plants which are located in that portion of the greater Detroit area which is located within the city limits of Detroit for the purpose of collective bargaining on matters of wages, hours and conditions of employment, excluding those mentioned in the next succeeding paragraph."

There is no dispute between the parties that paragraphs 17-40 of the agreement, under the heading of "Seniority" give certain seniority and recall-to-work rights to the plain-

tiffs and other employees of the Gemmer Company in the Company's operation of the Detroit plant. What is presented for decision is whether these seniority and recall-to-work rights are applicable to the defendant's operation of its plant at Lebanon, Tennessee, and, if so, whether they ceased to exist or expired with the expiration of the collective bargaining agreement on October 1, 1961.

The District Judge rendered an opinion on July 5, 1961, which is reported at 195 F. Supp. 826, in which he held that the 1958 collective bargaining agreement granted employees certain benefits and rights that became "vested" in the sense that they could not be unilaterally denied without their consent or other agreed means, such as the right to discharge; that these rights extended beyond the time limitations of the collective bargaining agreement; that these rights applied to a "plant" regardless of physical location under the contract and previous contracts; and that these rights included, among other things, seniority rights for the purpose of rehiring after layoff (which could go beyond an anniversary date) as provided in the agreement. The District Judge said that he felt bound by the ruling and reasoning of the Glidden case, supra, which was the case referred to in the Union's letter of May 9, 1961, and the contract being not to the contrary, the defendant had an obligation and duty to rehire on the basis of seniority those employees laid off in Detroit when that plant's operations were removed to Lebanon, Tennessee. An order declaring the rights of the parties in accordance with the views expressed in the opinion was entered July 7, 1961, from which this appeal was taken by the defendant.

Plaintiffs, in support of the judgment, rely strongly upon the ruling of the Court of Appeals for the Second Circuit in Zdanok v. Glidden Co., supra, 288 F. 2d 99, and the rea-

soning of the District Judge in the present case, particularly the statement in his opinion that "The Gemmer Division plant is the same plant wherever it is moved, in spite of the fact it might be known by a different name. Mere change of form will not change the substance, nor will mere change of location. This is the same plant, same machinery and equipment, same operation, same officers and supervisors, but in a new climate." They urge upon us that it would be unreasonable under such circumstances to have the agreement applicable to the plant while operating in Detroit and to hold that it is not applicable to the same plant merely because it has been moved to Tennessee.

Defendant relies upon the express wording of the agreement, which it contends specifically provides that the agreement is applicable only to a plant located within the city limits of Detroit; that there are good and valid reasons for restricting the application of the agreement to its plants within the city limits of Detroit, but, irrespective of that, in the absence of the restriction being contrary to public policy, it is of no concern to the Court whether the restriction is reasonable or unreasonable when the parties have expressly contracted for that result.

The collective bargaining agreement provides that the Company recognize the Union as the exclusive representative "of its employees in its plant or plants which are located in that portion of the greater Detroit area which is located within the city limits of Detroit for the purposes of collective bargaining, * * *" This is plain, unambiguous language. The agreement gave seniority and recall-to-work rights to employees in the defendant's plants which were within the city limits of Detroit. It gave no such rights to employees of a plant in Tennessee. Plaintiffs concede that the agreement is not applicable

to employees in a company plant in Michigan, even though only a short distance outside of the city limits of Detroit. They concede that the agreement would not be applicable to employees in a new plant in Tennessee other than the Gemmer plant. We see no material distinction, with respect to geographical location, between a new plant in Tennessee and the relocation of the Gemmer plant in Tennessee. In both cases the plant, new or old, is not in the city limits of Detroit, as limited by the agreement. It is true, as the District Judge pointed out, that the plant in Tennessee has the same machinery and equipment, the same officers and supervisors, and the same operation, but, as also stated by him, it is in a "new climate," which of course recognizes that it is not in the city limits of Detroit, but in Tennessee. Whether it would be advisable or reasonable under the existing circumstances to have the agreement apply to the plant in Tennessee is not for the Court to decide. We must construe the contract as it is written, rather than make a new contract for the parties. Standard Oil Co. v. Ogden & Moffett Co., 242 F. 2d 287, 291-292, C.A. 6th; Dura Electric Lamp Co. v. Westinghouse Electric Corp., 249 F. 2d 5, 7, C.A. 3rd; Jenkins v. King, 224 Ind. 164, 65 N. E. 2d 121, 163 A.L.R. 397; Babcock Coal & Coke Co. v. Brackens Creek Coal Land Co., 128 W. Va. 676, 37 S. E. 2d 519, 163 A.L.R. 871.

We are not in agreement with plaintiffs' contention that the agreement was for the benefit of the employees of the Gemmer Company, wherever it might be, in Detroit or in Tennessee, and that the reference in the agreement to the city limits of Detroit was merely a reference to where the Gemmer Company was then located. This ignores the fact that the reference is not to the employees of the Gemmer Company but to the Company's employees "in its plant or *plants*" within the city limits of Detroit. (Em-

phasis added.) The fact that the beneficiaries of the contract are specifically designated as the employees in all of the Company's plants within the city limits of Detroit instead of merely the employees of the Gemmer Company in Detroit makes it plain that the words were not used for the purpose of merely giving the present location of the Gemmer Company.

This argument is essentially the one upon which the Court of Appeals for the Second Circuit rested its decision in Zdanok v. Glidden Co., supra. But in that case there was a specific reference to one plant only, the address of which was specifically given, and there was no specific geographical limitation such as is contained in the agreement in the present case. In that respect the agreement in the Glidden Company case is materially different from the agreement in the present case, and in our opinion is not applicable on this phase of the case. In Metal Polishers, etc. v. Viking Equipment Co., 278 F. 2d 142, C.A. 3rd, also relied upon by the plaintiffs, it appears that the new location of the plant involved was still within the geographical limits referred to in the collective bargaining agreement, which, of course, is vitally different from the situation which we are considering in the present case.

Nor do we think there is merit in the contention that plaintiffs' seniority rights at the Detroit plant are "vested" rights, which cannot be cut off or defeated by the relocation of the plant in Tennessee. The argument is based upon the theory that through years of employment at the Gemmer plant they have "earned" such seniority rights in accordance with the terms of the agreement, which cannot be cancelled or taken from them by unilateral action on the part of the defendants, at least during the life of the bargaining agreement. Whether such rights

continue in existence beyond the end of the current bargaining agreement is another question, which we are not now considering. Clearly, the word "vested" is not the correct word to describe these rights, in that there are a number of ways in which such rights may be terminated or lost. Section 31 of the bargaining agreement provides for loss of seniority rights for any one of nine separate reasons, including quitting work or being discharged and not being reinstated through the grievance procedure. If an employee should die, his "earned" seniority rights become worthless and are not enforceable rights against the employer. If the company discontinues in business and terminates its operations, the employees' seniority rights are terminated. Local Lodge, 2040, etc. v. Servel, Inc., 268 F. 2d 692, 697-699, C.A. 7th. It appears to be well settled that such rights of the individual employees can be bargained away by the Union representing them in collective bargaining. Elder v. New York Central R. Co., 152 F. 2d 361, C.A. 6th; System Federation No. 59 etc. v. Louisiana & A. Ry. Co., 119 F. 2d 509, 515, C.A. 5th. It was so recognized in Zdanok v. Glidden Co., supra, 288 F. 2d 99, 103, C.A. 2nd.

Accordingly, we do not have the question of whether plaintiffs' "vested" rights can be validly terminated by relocation of the plant in Tennessee. Rather, it is the question of what rights, if any, the plaintiffs have under the express provisions of the bargaining agreement upon the relocation of the plant in Tennessee. If no rights were acquired under the bargaining agreement as employees at the Tennessee plant, it necessarily follows that no rights have been cut off. If the 1958 bargaining agreement bargained away the employees' seniority rights which they had at the Detroit plant in the event they sought employment at a company plant in any city other than Detroit,

they lost their rights through operation of the contract. Elder v. New York Central R. Co., supra, 152 F. 2d 361, C.A. 6th; System Federation No. 59, etc. v. Louisiana & A. R. Co., supra, 119 F. 2d 509, 515, C.A. 5th. As heretofore pointed out, the only question which we have is what is the proper construction to be given to the 1958 agreement between the parties. Under our construction of the agreement the employees acquired no seniority rights under the 1958 agreement as employees at the Tennessee plant. Since no rights were acquired, we do not reach the question of any rights being cut off by unilateral action on the part of the defendant, either during the existence of the bargaining agreement or after its expiration.

The construction which we are presently giving to the collective bargaining agreement appears to be in accord with the construction also given to it by the Union until shortly before the filing of this action. In August 1947 Gemmer Manufacturing Company, predecessor of the Gemmer Company herein, entered into a collective bargaining agreement with the Union, in the preamble of which the address of Gemmer Manufacturing Company was given as 6400 Mr. Elliott Avenue, Detroit, Michigan. The recognition clause recognized the Union as the exclusive representative of its employees without any other designation or limitation of geographical area. The company maintained an experimental plant on Nine Mile Road just outside the city limits of Detroit. In the 1951 negotiations the Union, apparently recognizing that the 6400 Mt. Elliott Avenue address of the company in the 1947 agreement made it inapplicable to the experimental plant, and wishing to include the experimental plant in the 1951 agreement, proposed to delete the 6400 Mt. Elliott Avenue address from the preamble of the agreement and to change the wording of the paragraph dealing with recognition of the Union so

as to make the agreement apply to all employees of Gemmer Company in the greater Detroit area. The company rejected this proposal but did change the wording of the recognition clause so as to apply to its employees in "its plant or plants which are located in that portion of the greater Detroit area which is located within the city limits of Detroit"

This same language was again used in the bargaining agreement executed September 1, 1955, and expiring June 1, 1958. During the term of the 1955-1958 bargaining agreement Gemmer Manufacturing Company was acquired by the defendant.

In the negotiations leading up to the 1958 bargaining agreement the Union again proposed that the recognition clause be changed so as to apply to the Company's employees in the greater Detroit area, not restricted to the city limits. It also submitted a proposal that in the event the company moved its operations to other locations, the Union would be recognized for the purpose of collective bargaining on the matters of wages, hours, and conditions of employment and that certain problems involved, including moving costs and seniority transfers, be subject to negotiations. These proposals were rejected and the language in the 1955 agreement was again used.

It will be noticed that following the first notice to employees on January 13, 1961, about the new Tennessee division, the Union in its letter of January 25, 1961, to the Company made no claim of seniority rights with respect to employment at the Tennessee plant under the 1958 agreement. It merely requested that any employee affected because of the transfer of a job be given an opportunity to go to Lebanon with the job and stated, "We feel you will agree that the long service given by an employee to the

Company should be allowed to continue if he is willing to follow the operation to the new company location." It was not until May 29, 1961, following the decision in Zdanok v. Glidden Co., supra, on March 28, 1961, that the Union changed its "request" into a claim that such rights existed under the ruling in that case. This clearly seems to be a new and different construction of the agreement from that given by the Union to the agreement before this case was decided.

One of the fundamental rules in the construction of contracts is for the court to give great weight to the construction which the parties themselves have given to the contract as shown by their actions thereunder. Reynolds Metals Co v. Skinner, 166 F. 2d 66, 71, C.A. 6th, cert. denied, 334 U.S. 858, 68 S. Ct. 1528, 92 L. Ed. 1778; Begnaud v. White, 170 F. 2d 323, 325-326, C.A. 6th.

The judgment of the District Court is reversed and the case remanded to the District Court with instructions to enter a judgment declaring the rights of the parties in accordance with the views expressed herein.

OPINION OF UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN,—

195 F. Supp. 826 (July 5, 1961)

ODDIE v. ROSS GEAR & TOOL CO.

KAESS, District Judge:

Plaintiffs are employees who bring this action in behalf of themselves and their fellow seniority employees of the Gemmer Manufacturing Company, a division of Ross Gear and Tool Company, Inc., an Indiana corpora-

tion. They bring this action purportedly in behalf of themselves and others similarly situated for a declaration of rights, together with temporary injunctive relief, pending final adjudication, and any money damages that may be earned upon a final hearing.

The defendant is in the business of manufacturing steering gears for automobiles, etc., and is an Indiana corporation. The defendant company has two plants presently in operation, one its original plant in Indiana, and the acquired division, known as the Gemmer Manufacturing Company of Detroit, Michigan.

The Gemmer Division has recognized the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America UAW (AFL-CIO) and its Local Union Number 80, as exclusive bargaining agent of its employees at the Detroit plant, and had entered into a collective bargaining agreement with such Union.

The defendant company, Ross Gear and Tool Company, Inc., acquired certain property in Lebanon, Tennessee, and on January 13, 1961 posted a notice advising the employees of the Gemmer Division that it had formed a Tennessee Division, and that some products then manufactured in Detroit would be transferred to Tennessee. Later, however, it became apparent, and there seems to be no doubt, that the entire Gemmer Division, lock, stock and barrel, is to be moved to Lebanon, Tennessee, and to be called the Tennessee Division of the Ross Gear and Tool Company, Inc. On May 22, 1961 the defendant announced its decision to terminate the plant operations conducted by the Gemmer Division in Detroit and further advised that the equipment and operations are to be transferred to its new division, beginning July 1, 1961, with production being concluded in the Gemmer Division on or about September 2, 1961. Thus

the transfer or move will be in two phases—one beginning July 1, 1961 and the concluding phase on September 2, 1961. The first phase, however, will not affect or terminate the employment of the plaintiffs or affect their seniority rights. However the defendant advises that all seniority rights will be terminated on September 2, 1961 and the Detroit plant is to be closed.

The basic facts seem clear in this respect. The defendant company proposes to close its plant at Detroit, Michigan, and move it to Lebanon, Tennessee.

If this were all, it would thus far be clear that the defendant could do practically whatever it chose to do, at least with respect to its labor and employment relations, but there is and has been a labor contract in existence for over twenty years, its present expiration being October 1, 1961. The defendant company and its predecessor have been a party to the contract, as has been Local Number 80 of the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America UAW (AFL-CIO).

During this time certain valuable rights have been created by contract, to both the employer and the employee. Perhaps those rights gravitate more to one side than the other, but certainly affect both.

In, and by reason of, the past and present contracts, the employees became beneficiaries of certain rights, to quote but one for the moment, certain pension rights or retirement benefits which can and do survive the contract and are so contemplated by the parties.

The issue here is, do seniority rights survive by analogy as an earned right?

In *Zdanok v. Glidden Co.*, 288 F. 2d 99 (103) seniority is called a "vested" right, or one "earned", as a type of unemployment insurance "earned and acquired by continuous service."

The court goes on to say, however, at page 103, that "the *employee* owning that right, *or his authorized Union agent*, could bargain away the employee's rights" (Italics ours).

In our case here the contract is still in force. Neither the Union nor the employees have sought to change it—nor perhaps would they. But the issue at the moment evolves about the proposition as to whether or not the contract can be annulled unilaterally by the mere moving of the defendant's plant to another state.

To be consistent with the *Glidden* case, supra, if that were the only issue, the answer would obviously be "No." Therefore this court must determine whether or not the contract now in force, by its terms may have bargained away that right.

It becomes essential to determine the provisions of the contract and to determine its intended meaning. First we must look to the contract as a whole and attempt to apply normal meaning to the words themselves, and then, if they be ambiguous, inquire into the history and surrounding circumstances to elicit their meaning and the intention of the parties.

The present contract of 1958 says, following its opening preamble and in its first section, entitled "Recognition":

> "1. The Company recognizes the union as the exclusive representative of its employees in *its plant* or *plants* which are located in that portion of the greater Detroit area which is located *within the*

city limits of Detroit for the purpose of collective bargaining on matters of wages, hours and conditions of employment. * * *"

Evidence was submitted by the defendant which disclosed that in those contracts duly negotiated by the Union *prior* to the 1951 contract, the following clause was in its place:

"1. The Company recognizes the Union as the exclusive representative of its employees for the purpose of collective bargaining on matters of wages, hours and conditions of employment. * * *"

In the collective bargaining agreement of 1951 (as well as in those thereafter) the above opening provision of the contract was changed to read as follows:

"(1) The Company recognizes the Union as the exclusive representative of its employees in its plant or plants which are located in that portion of the greater Detroit area which is located within the city limits of Detroit for the purpose of collective bargaining on the matter of wages, hours and conditions of employment. * * *"

This last quoted language remained and was used verbatim as a part of the 1955 and 1958 contracts, the latter being the one here involved and expiring some three months from now.

During the term of the 1955 to 1958 contract Gemmer Manufacturing Company was acquired by the defendant Ross Gear and Tool Company, Inc., an Indiana corporation, and Gemmer continued to be operated as a division of Ross Gear and Tool Company, Inc.

Defendant submits that during the negotiation of the 1958 contract (that which is now in force and expiring October 1, 1961) the Union submitted the following as a substitute for the above Section 1:

"RECOGNITION

"1. The Company recognizes the union as the exclusive representative of its employees in its plant or plants which are located in the greater Detroit area for the purpose of collective bargaining on matters of wages, hours and conditions of employment, excluding those mentioned in paragraph 2.

(a) In the event the company creates other plants or facilities regardless of location under the administration of the company, the union shall be recognized for the purpose of collective bargaining on matters of wages, hours, conditions of employment, seniority transfers, and all matters embodied in this agreement.

(b) In the event the company moves its operations to other locations, the union shall be recognized for the purpose of collective bargaining on matters of wages, hours and conditions of employment. Should this condition occur this matter will be subject to negotiations between the company and the union, such as moving costs of employees, severance pay, seniority transfers, and all other matters pertaining to this situation."

Such proposal was declined by the defendant and Section 1 of the contract remained as it had been prior thereto and since the 1951 contract.

The normal inference that one would draw from such a proposed substitute section, and then to compare it with the Section 1 of the contract then in force (as quoted o. page 5, from 1951 contract) promptly leads one to believe that the parties had negotiated on the problem of moving t. Lebanon, Tennessee, or at least moving somewhere, and had agreed that all matters involved in the contract would

and could have only force and effect within the limitations of the city of Detroit. In effect, it appeared the Union had conceded and bargained away all the benefits of the employees in the event the plant moved from within the city limits of Detroit.

However, testimony taken in this respect showed the situation surrounding the negotiations in 1951 to be quite different. Gemmer had another plant in the area at that time, which was located just over the city limits of Detroit, an experimental plant, which the Union sought to obtain within its bargaining agreement. The Company declined and the rephrasing of Section 1 was in contemplation of that situation, and not any proposed move of the plant.

Referring above to the proposed change involving moving or changing of locations as stated and proposed by the Union in its negotiations in 1958 agreement (the one presently in force), testimony disclosed that with the acquisition of the Gemmer Division by the defendant Ross Gear and Tool Company, Inc., the corporation had two plants, one its original plant in Indiana and the acquired plant, Gemmer Manufacturing Company in Detroit. Because of various reasons (none important here) there had been many rumors reaching the ears of the Union that the defendant would move or, more properly, consolidate its Detroit operation with the Indiana plant, thus operating to jeopardize the interest of the local Union. In order to anticipate such a change, the Local proposed the section referred to, involving moving or transferring. Further testimony intimated that the Union did not press the provision on learning another Local of the same International Union, United Automobile, Aircraft and Agricultral Implement Workers of America UAW (AFL-CIO) was the bargaining agent at the Indiana plant and felt they could probably work out any problems between them covering seniority.

Thus, on closer observation it seems quite clear that the intent of the parties was not that which at first look might have bargained away certain rights and benefits of the employees, since the reasons and purposes for the contract changes were well known to the parties, but were for reasons *other* than in contemplation of any possible move of the Detroit plant to another distinct location.

Therefore, this Court is of the opinion whatever emphasis the defendant now chooses to place on Section 1 goes for naught, and we must then return to the contract to determine whether the seniority rights and benefits of the plaintiffs, are in jeopardy. This Court feels bounded by the *Glidden* case, *supra*, and its reasoning, and since there is nothing within the contract now in force to the contrary, those seniority rights are to continue.

We next come to the geographical situation, as advanced by the defendant. Defendant further claims that the limitations within Section 1 terminate the seniority benefits of the plaintiffs on its moving its plant to Tennessee. We cannot agree. Section 1 applies only with respect to the "*recognition*" of the *Union*, and has no geographical limitations as to the benefits of the *employees* and their rights under the contract.

This Court is reluctant to reach any conclusion with respect to the effect the company's move might have on the Union itself, particularly since the Union itself has instituted similar litigation pending before another Judge of this Court. However, in order to make our meaning clear, it might be that since the recognition clause goes only to the *Union* as an entity, it could follow that its right to represent the employees in Tennessee has been bargained away by Section 1. However, we must leave any such decision in the determination of the other case.

To reach our conclusion this Court's reasoning is based on this premise. The Gemmer Division plant is the same plant wherever it is moved, in spite of the fact it might be known by a different name. Mere change of form will not change the substance, nor will mere change of location. This is the same plant, same machinery and equipment, same operation, same officers and supervisors, but in a new climate. The benefits created for the employees under that contract should not be said to be unilaterally terminated by mere change of location. Such logic seems the more reasonable and just in the light of the real meaning of Section 1 and more specifically when the contract still has until October 1, 1961 to run. The mere fact that there is a termination date in a collective bargaining agreement does not terminate all the rights and benefits of the employees under that agreement, but merely designates a certain time agreed upon by the parties when there would be further negotiations concerning those rights and benefits. Therefore the fact that this agreement in question has a termination date does not automatically remove all of the rights and benefits previously acquired by the employees. Although, as in this case, the agreement itself with the Union as a bargaining agent might have been terminated by the move to Lebanon, the rights and benefits that have accrued to the individual employees persist and cannot be unilaterally denied by the employer without the employees' consent. Among these rights and benefits would be included the right of seniority or, as more specifically involved in this case, *the right to be rehired by the employer after a lay-off, as stated in the contract.* Nothing herein, however, should be construed to mean that at the time of the expiration of the contract, new provisions may not be agreed upon, to the extent of an entirely new contract, nor that the employees may not select a new bargaining agent, or that

they can bargain away, alter or enlarge any of their rights, even to the extent of having a Union.

Our conclusion implies that the Union, as an identity, might only be able to represent the plaintiffs and those similarly situated in Detroit, but we are satisfied that it does not terminate all the rights of the plaintiffs created by a contract that has been in existence for some twenty years and upwards, and which was made in contemplation of those future rights.

It is the Court's conclusion:

1. That the collective bargaining agreement grants the employees certain benefits and rights that become "vested" in the sense that they cannot be unilaterally denied without their consent or other agreed means, such as the right to discharge.

2. That these rights extend beyond the time limitations of the collective bargaining agreement.

3. That these rights apply to a "plant" regardless of physical location under this contract and previous contracts.

4. That these rights include, among other things, seniority rights for the purpose of rehiring after layoff (which could go beyond an anniversary date) as provided in the agreement.

5. That the limitation as set forth in Section 1, the recognition clause of this agreement, applies only to the extent of Union representation and does not affect future benefits and rights of employees agreed upon by contract.

Therefore, the contract being not to the contrary, and pursuant to the holding in the *Glidden* case, *supra,* defendant has an obligation and duty to rehire on the basis of

seniority those employees laid off in Detroit when that plant's operations are removed to Lebanon, Tennessee.

Should this decision, as requested by plaintiffs on these undisputed facts, not be dispositive under the Federal Declaratory Judgment Act (28 USCA 2201), plaintiffs may request the Court to take such further action as might be necessary at the time.

FRED W. KAESS,
United States District Judge.

APPENDIX B

CONFLICTING OPINIONS

OPINION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT IN ZDANOK v. GLIDDEN CO.—288 F. 2d 99 (1961)

Olga Zdanok, John Zacharczyk, Mary A. Hackett, Quitman Williams and Marcelle Kreischer,
Plaintiffs-Appellants,

v.

Glidden Company, Durkee Famous Foods Division, a Foreign Corporation, Defendant-Appellee.

No. 217, Docket 26542.

United States Court of Appeals.
Second Circuit.

Argued Feb. 8, 1961.

Decided March 28, 1961.

Petition for Rehearing and Rehearing in Banc Denied April 24, 1961.

Before LUMBARD, Chief Judge, MADDEN, Judge, United States Court of Claims,* and WATERMAN, Circuit Judge.

MADDEN, Judge.

The plaintiffs sued in the District Court for the Southern District of New York for damages for alleged breach by the defendant of a contract made for their benefit by a labor union. The District Court had jurisdiction because

* Sitting by designation.

of diversity of citizenship. The Court decided that they were not entitled to recover, 185 F. Supp. 441, and they have appealed.

From 1929 until November 30, 1957, the defendant operated a plant at Elmhurst, New York, known as its Durkee Famous Foods Division. The plaintiffs are members of General Warehousemen's Union, Local 852, which is affiliated with the Teamsters' Union. The defendant and Local 852 had had collective bargaining agreements since December 1, 1949, each agreement covering a two-year period. The last agreement covered the period December 1, 1955 to November 30, 1957.

Each agreement contained a provision establishing a system of seniority which required that in case of a curtailment of production, employees were to be laid off in the reverse order of seniority. If, at the time he was laid off, an employee had had five or more years of continuous employment, his seniority would entitle him to be reemployed if an opening for reemployment for one having his seniority occurred within three years after his lay-off. If he had had less than five years of employment before his lay-off, he would be entitled to reemployment if an opening for one with his seniority occurred within two years after his lay-off. The contract between the union and the employer contained a non-contributory pension plan, with normal retirement on pension at age 65, early retirement at 55 if the employee had had 15 years of service, and other types of pensions under specified conditions. The contract also included hospital, medical and surgical insurance, life insurance and accidental death insurance to be paid for by the employer.

On September 16, 1957, the defendant gave written notice to the union that it would terminate the collective bargaining contract at its expiration date, November 30, 1957.

After September 16 it began to reduce production at Elmhurst, and to remove its machinery and equipment from Elmhurst to a newly established plant at Bethlehem, Pennsylvania. The employment of four of the five plaintiffs was terminated on November 1, and that of the fifth one on November 18. The ages of the five plaintiffs, at the time of their discharge, ranged from 43 to 61 years, and their periods of employment with the defendant ranged from 10 to 25 years.

The defendant removed a considerable part of its machinery from its Elmhurst plant to the new Bethlehem plant, and manufactured there a number of the same products. The Bethlehem plant was more modern and efficient, and apparently had a considerable number of new machines, in addition to the ones moved from Elmhurst. Some of the products formerly made at Elmhurst were, after the closing of that plant, made at the defendant's Louisville plant.

There was work at the Bethlehem plant similar to that done at Elmhurst by three of the plaintiffs. As to the other two plaintiffs, who were men, aged 43 and 49, their work at Elmhurst was to check merchandise that was loaded or unloaded from trucks leaving or entering that plant. At the Bethlehem plant such duties have been incorporated into other job classifications which specify the employee to load and unload the trucks and to operate an electric walking type lift truck to stack the merchandise in the storage area as well as to check the incoming and outgoing merchandise that the employee loads and unloads. This different Bethlehem work would not seem to have required any skill that could not have been acquired in a short time.

The defendant offered to give fair consideration to applications for employment at its Bethlehem plant, to its former employees at Elmhurst, only if they would come

to Bethlehem and make application there on the same basis as new applicants who might seek employment there. Two Elmhurst employees, not plaintiffs herein, made such applications, and their applications were accepted. Only one of them actually went to work. He has been considered as a new employee at Bethlehem, with no seniority carried over from Elmhurst.

The plaintiffs contend that they were, as beneficiaries of the contract between their union and the defendant, entitled to the jobs which were created by the opening of the plant at Bethlehem. They say that they were laid off because of the removal of the machinery and the cessation of operations at Elmhurst, and that as work was opened up at Bethlehem they were entitled, by reason of their seniority and the contract provisions relating to it, to go to work at Bethlehem with the seniority which they had acquired at Elmhurst.

The defendant offers several defenses. We consider first the defense of *res judicata*. That defense was considered and rejected, first by Judge Dimock, on a motion by the defendant for summary judgment and again, after the defendant had filed its answer asserting *res judicata* as an affirmative defense, by Judge Palmieri, in his decision and opinion on the merits of the case.

Local 852, the plaintiffs' union served on the defendant a notice of intention to arbitrate certain designated disputes, pursuant to the arbitration provision in the union's contract with the defendant. The defendant made a motion in the Supreme Court of New York to stay arbitration, on the ground that the disputes were not arbitrable under the arbitration provision of the contract. That provision said:

> "Any question, grievance or dispute arising out of and involving the interpretation and application *of the specific terms* of this Agreement • • • shall, at the request of either party, be referred to the New York State Mediation Board for arbitration." (Emphasis supplied.)

The court granted the defendant's motion, on the ground that the subjects sought to be arbitated were not covered by *the specific terms* of the contract. The court's opinion[1] lays much emphasis on the word *specific* in the agreement to arbitrate and says that "no one is under a duty to resort to arbitration unless by clear language he has so agreed." The court concluded its opinion with this sentence:

> "It follows from all the foregoing that Glidden's motion to stay arbitration must be granted, whatever other remedies the Union may have with respect to the alleged disputes."

The New York court's opinion as a whole, and its concluding paragraph seem to us to show that the court was deciding nothing more than that the arbitration provision, as narrowly written, did not confer jurisdiction upon an arbitration tribunal to adjudicate the disputes in question. If the court had decided, as the defendant claims, that the contract as a whole, in its circumstances, and including its fair implications, conferred no rights upon the union or the employees with regard to the asserted disputes, the court's concluding paragraph defies understanding.

The defendant also contends that because the collective bargaining agreement contained provisions for the arbitration of disputes, the plaintiffs are not entitled to individually enforce their rights under the agreement. The defendant relies heavily upon Parker v. Borock, 1959, 5

---

[1] Matter of General Warehousemen's Union, 1958, 10 Misc. 2d 700, 172 N.Y.S. 2d 678.

N.Y. 2d 156, 182 N.Y.S. 2d 577, 156 N.E. 2d 297, as support for its contention that the plaintiffs individually are not entitled to enforce the rights which they claim here. In the Parker case, the plaintiff had been discharged "for cause." He invoked the grievance procedure of the collective bargaining agreement between his union and employer. He was not reinstated, and the union refused his request to seek arbitration. He thereupon moved in the United States District Court to compel the employer to arbitrate his discharge. The motion was denied.

The plaintiff then sued in the New York state courts for money damages for breach of the collective agreement, asserting that the employer did not have "cause" to discharge him. The defendant moved for a stay pending arbitration, but its motion was denied on the ground that only the employer or the union, and not an employee, could seek a submission to arbitration. The defendant then moved for summary judgment. The New York Supreme Court denied the motion, but the Appellate Division's reversal, granting the motion, was affirmed by the Court of Appeals.

The Court of Appeals said, 5 N.Y. 2d at page 160, 182 N.Y. 2d at page 580, 156 N.E. 2d at page 299, that "the employee is the direct beneficiary" of provisions in a collective agreement prohibiting discharge of an employee except for cause. The court held, however, that the plaintiff, who was also "bound by and limited to the provisions of the agreement," had "entrusted his rights to his union representative," who alone could have sought arbitration of the plaintiff's discharge. 5 N.Y. 2d at page 161, 182 N.Y.S. 2d at page 580, 156 N.E. 2d at pages 299-300. The court noted that the plaintiff's only remedy would be against the union for failing to fulfill its duties under the agreement.

The Parker case is, therefore, significantly different from the instant case. In Parker, the question which the plaintiff sought to litigate had been entrusted by him, under the collective agreement, to the arbitration process.[1] That was the interpretation which the New York Court of Appeals placed upon the contract there before it. In the instant case as we have seen, the Supreme Court of New York has held that the dispute with which this suit is concerned is *not* covered by the arbitration provision of the agreement.[2] The plaintiffs have not, therefore, entrusted to their union representative the rights which they now seek to enforce.

As to the merits of the plaintiffs' claims, the defendant takes the bold position that the collective bargaining contract conferred upon the employees no rights which survived the contract. It says, at page 27 of its memorandum:

> "Even if the Elmhurst operations had continued but the collective bargaining agreement had expired, the seniority status of plaintiffs would not have survived the termination of that agreement. For it is only by reason of existing provisions in the agreement that provisions relating to the seniority have any application. When such provisions no longer exist, seniority no longer exists."

The defendant may have assumed this bold and uncompromising position because it feels uneasy about Judge Palmieri's having based his decision solely upon the geographical shift of the plaintiff's factory operations. We discuss that problem later herein.

We think the defendant's language, quoted above, is not supportable. Suppose an employee had completed five years of service in October, 1957. Under the seniority provision of the collective bargaining agreement, he thinks that

---

[2] Matter of General Warehousemen's Union, *supra*.

he has earned and acquired, by continuous service, valuable insurance against unemployment; that by reason of having worked continuously for this company longer than many of his fellow workmen, he could not be laid off unless the lay-off cut deep into the working force; that even if he should be reached in a lay-off, he would be sure to be re-employed if at any time within three years after the lay-off his name should be reached on the seniority list, for reemployment. As we have seen, the defendant's position is that the employee had not acquired any such rights.

Rights embodied in a collective bargaining contract negotiated by a union "inure to the direct benefit of employees and may be the subject of a cause of action." Parker v. Borock, 5 N.Y. 2d 156, 182 N.Y.S. 2d 577, 156 N.E. 2d 297-298, citing Barth v. Addie Co., 271 N.Y. 31, 2 N.E. 2d 34, and other New York cases. If one has in October a right to demand performance of the corresponding obligation at any relevant time within a period of three years, it would be strange if the other contracting party could unilaterally terminate the right at the end of three weeks. Of course the employee owning the right, or his authorized union agent, could bargain away the employee's right. Nothing of that kind occurred in the instant case.

At the time the Elmhurst employees were discharged, those who had reached the age of 65 and had otherwise satisfied the conditions prescribed in the collective bargaining agreement for receiving retired pay, were placed on the defendant's retired list and have been and are currently receiving their retired pay. Similarly, those who had reached the age of 55, or who had become permanently disabled in the service of the defendant, and had had 15 years of employment with the defendant, are receiving their retired pay. Those who had 15 years of service and had

reached the age of 45 at the time of their discharge were advised by the defendant that they had vested rights to retirement benefits and would begin to receive payments when they reached the age of 65.

These rights to retired pay, though their realization will extend far into the future, and though they arise solely and only out of the terms of the union agreement with the defendant, have been treated as "vested" rights and are being voluntarily honored by the defendant. This was, we suppose, because the employees had earned these rights by compliance with the terms of the contract, and the fact that the contract was not renewed, and that other workmen in the future might not have the opportunity to earn similar rights, was irrelevant. We think the plaintiff employees had, by the same token, "earned" their valuable unemployment insurance, and that their rights in it were "vested" and could not be unilaterally annulled.

We think, then, that if the plaintiff had continued to operate the Elmhurst plant, without a renewal of the union contract, or had reopened it after it had been closed for a time, the employees would have been entitled to reemployment, with seniority. This brings us to the issue which Judge Palmieri in the District Court found to be the critical issue, i.e., whether the unit to which the employees' rights attached "extended beyond the Elmhurst plant." [185 F. Supp. 447]. He held that the rights were not enforceable except in the Elmhurst plant, and therefor denied recovery. With deference, we disagree with the conclusion.

The union contract, in its preamble, recited that it was made by the defendant company

> "for and on behalf of its plant facilities located at Corona Avenue and 94th Street, Elmhurst, Long Island, New York."

If this narrow geographical description is treated as setting fixed boundaries upon the scope of the contract, difficulties immediately arise. If the plant moved from 94th Street to 93rd Street in Elmhurst, an entire structure of valuable legal rights would tumble down. *A fortiori* if the plant moved to a site a few miles or a good many miles away, the consequence would be the same. But one would be obliged to wonder why so catastrophic a consequence should follow a mere change in physical location. And it would be hard to conjure up a reason why it should. Rather it would seem that the recital in the contract would be analogous to the *descriptio personae* familiar to the law in various situations.

A rational construction of the contract would seem to require that the statement of location was nothing more than a reference to the then existing situation, and had none of the vital significance which the defendant would attach to it. Contracts must, in all fairness, be construed *ut res magis valeat quam pereat.* If not, the reasonable expectations of the parties are sacrificed to sheer verbalism.

In the instant case the plant was, of course, not moved from 94th Street to 93rd Street in Elmhurst, nor from Elmhurst to another town within commuting distance of the then residences of the employees. It was moved to a city in another state. That fact does not seem to us to be decisive. It would, of course, have confronted the employees with troublesome problems. They would have had to decide whether the advantages of continued employment with this employer, the right to which they had earned in Elmhurst, were sufficient to induce them to make so considerable a move. It is probable that many of them would not have made the move. Those to whom the defendant had offered employment in Bethlehem, who did not accept the offer,

would have, in effect, resigned their seniority and the rights that accompanied continued employment.

We can see no expense or embarrassment to the defendant which would have resulted from its adopting the more rational, not to say humane, construction of its contract. The plaintiffs were, so far as appears, competent and satisfactory employees. They had long since completed the period of probation prescribed in the union contract. It would seem that they would have been at least as useful employees as newly hired applicants. The defendant's Bethlehem plant was a new plant. There could not have been an existing union representative or a collective bargaining agreement there, at the time the plant was opened.

In the circumstances, no detriment to the defendant would have resulted from a recognition by the defendant of rights in its employees corresponding with their reasonable expectations. In that situation, a construction of the contract which would disappoint those expectations would be irrational and destructive.

It follows from what we have said that the plaintiffs were entitled to be employed at the defendant's Bethlehem plant, with the seniority and reemployment rights which they had acquired at the Elmhurst plant. The refusal of the defendant to recognize that entitlement was a breach of contract, and the plaintiffs are entitled to recover the damages which that breach has caused them.

The plaintiffs allege in their complaint that they have been "deprived of employment by the defendant," as a result of the defendant's conduct recited above. That is an adequate allegation that they would have accepted employment at Bethlehem if it had been offered to them on the terms to which they were entitled. Proof of this allegation may well fall short of complete conviction, but the

trier of fact will not penalize the plaintiffs on account of the uncertainty which has been caused by the defendant's conduct.

Whatever pension rights would have been earned by employment at Bethlehem, if it had been accepted, must be recognized by the defendant.

Since the case will be remanded, we leave to the District Court consideration of the right of recovery, if any, in connection with the welfare plan and the group insurance plan which were included in the union agreement.

[8] It appears that the named plaintiff Mary A. Hackett is deceased, and that no motion for substitution has been made. Unless a proper motion is made, the District Court will dismiss the complaint as to that plaintiff.

The judgment of the District Court is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

LUMBARD, Chief Judge (dissenting).

For the reasons persuasively set forth in Judge Palmieri's careful and thorough opinion, reported at 185 F. Supp. 441, I would affirm.

It is immaterial to the resolution of the question before us that the employment of competent and satisfactory employees is suddenly terminated, or even that the employer has acted ungenerously, as indeed it has. We are called upon to construe the contract upon which the parties agreed and not to substitute for it one with more humane or less destructive terms.

The parties have assumed here that the Supreme Court's decision in Textile Workers Union v. Lincoln Mills, 1957,

353 U.S. 448, 77 S. Ct. 912, 1 L. Ed. 2d 972, did not *sub silentio* overrule the distinction between "individual" and "union" rights announced in Association of Westinghouse Salaried Employees v. Westinghouse Elec. Co., 1955, 348 U.S. 437, 461, 75 S. Ct. 488, 99 L. Ed. 510. Although the survival of this distinction gives the employees standing personally to assert "individual" rights arising out of a collective-bargaining agreement, Local Lodge 2040 Intern. Ass'n of Machinists A.F.L.-C.I.O. v. Servel, Inc., 7 Cir., 268 F. 2d 692, 696, certiorari denied, 1959, 361 U.S. 884, 80 S. Ct. 155, 4 L. Ed. 2d 120, the contract should be construed in light of federal substantive law pursuant to § 301 of the Labor Management Relations Act, 29 U.S.C.A. § 185.

The federal cases hold that seniority is not inherent in the employment relationship but arises out of the contract. E.g., Elder v. New York Central R.R., 6 Cir., 1945, 152 F. 2d 361, 364; see Note, 54 Nw. U.L. Rev. 646, 649-50 (1959). If rights are to persist beyond the term of the collective-bargaining agreement, the agreement must so provide or be susceptible of such construction. See United Steelworkers v. Enterprise Wheel & Car Corp., 1960, 363 U.S. 593, 80 S. Ct. 1358, 4 L. Ed. 2d 1424.

The agreement we are here called upon to interpret did not expressly provide for any retention of seniority rights beyond the termination of the collective-bargaining agreement. The employees claim, however, that by agreeing to rehire on the basis of seniority for two or three years after layoff, the employer undertook not only to retain seniority rights after the expiration of the agreement but to extend existing seniority privileges to any other location to which the work then done at Elmhurst would be assigned. Relocation of an employer's plant does not, of course, automatically terminate all rights under a collective-bargain-

ing agreement; whether such rights continue depends on the terms of the contract. See Metal Polishers, Buffers, Platers, and Helpers Intern. Union, Local 44 A.F.L.-C.I.O. v. Viking Equipment Co., 3 Cir., 1960, 278 F. 2d 142. The issue here is whether this collective-bargaining agreement gave the employees the right to "follow the work" to the new site. I would hold that it did not.

The closing of the Elmhurst plant and the removal of the defendant's operations to a new location were concededly done in good faith and were not wholly unforeseeable. As Judge Palmieri points out, it is not uncommon for the parties to extend beyond a single plant the area in which seniority rights are to apply. Surely unions are now fully of age and are able to protect themselves and their members at the bargaining table. The consequences of dismissing the plaintiffs' case might indeed be unfortunate and even "catastrophic" from their point of view, but it is hardly "irrational and destructive" for a court to leave the parties as they are if they have never seen fit to provide otherwise.

OPINION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT IN METAL POLISHERS UNION v. VIKING EQUIPMENT CO., 272 F. 2d 142

Metal Polishers, Buffers, Platers and Helpers International Union, Local 44, AFL-CIO,
Appellant,
v.
Viking Equipment Company, a Corporation of the State of New Jersey.

No. 13215.

United States Court of Appeals
Third Circuit.

Argued May 9, 1960.

Decided May 13, 1960.

Before GOODRICH, McLAUGHLIN and STALEY, Circuit Judges.

PER CURIAM.

Plaintiff union sues the defendant asking for money damages for breach of contract, for submission of a dispute to an impartial mediator in accordance with the terms of the contract and, in a second count, for an injunction restraining defendant from entering into or continuing in effect any agreement with any labor organization other than the plaintiff for the class of employees alleged to be covered by the plaintiff's contract. Jurisdiction of the district court is based on Section 301(a) of the Labor-Management Relations Act, 29 U.S.C.A. §185 (a). The dis-

trict judge denied the motion for preliminary injunction and held a motion for summary judgment under consideration.

The plaintiff union had a collective bargaining contract with the defendant employer which expires by its terms on May 31, 1960 although it is to be continued from year to year unless certain required notices are given. The defendant, in December, 1959, moved its plant from East Orange, New Jersey, to Pennsauken, New Jersey. It takes the position that this move on its part brought the contract with the plaintiff union to an end since, it argues, the contract applies only to activities by the defendant in East Orange, New Jersey. The district judge accepted this view. In denying the motion for preliminary injunction he really passed on the merits of the case since, obviously, if the contract was no longer in force the plaintiff is not entitled to injunctive or any other kind of relief.

We disagree with the district judge in his interpretation of the contract. We do not think it is to be interpreted as applicable only to defendant's activities in East Orange, New Jeresy. And we do not think that the defendant brought it to an end by its unilateral action in moving from East Orange to Pennsauken. Since the case was decided, not upon the ground that equitable relief was not applicable, but on the ground that the plaintiff was entitled to no relief at all, we shall reverse. The case will be remanded to the district court with instructions to proceed to the consideration of the merits of the plaintiff's claim for equitable relief and any other remedy which is requested by it for the breach of contract.

LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
NOV 13 1962
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. 514.

JAMES ODDIE, EDWARD CWIERTNIEWICZ,
JOHN PENZAK, OSCAR KING,
HARRY C. BREMMER,

Petitioners,

v.

ROSS GEAR AND TOOL COMPANY, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

OWEN J. NEIGHBOURS,
JAMES M. NICHOLSON,
1350 Consolidated Building,
Indianapolis, Indiana,
Counsel for Respondents.

CADICK, BURNS, DUCK & NEIGHBOURS,
1350 Consolidated Building,
Indianapolis, Indiana,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-8847

TABLE OF CONTENTS.

Question Presented	1
Statute Involved	2
Statement of the Case	2
Facts	2
The Proceeding Before the District Court	7
The Proceeding Before the Court of Appeals	8
Argument	10
A. There Is No Conflict Between Courts of Appeal	10
1. Introduction	10
2. The Court of Appeals for the Second Circuit	11
3. The Court of Appeals for the Third Circuit	13
4. Conclusion	15
B. No Important Question of Federal Law Is Involved	16
1. Introduction	16
2. Seniority Under the Gemmer Contract	17
3. The Result Below is Based Upon the Application of a Principle of Law That is Both State and Federal	19
4. This Action Has Not Been Brought Under Section 301(a)	21
5. Conclusion	23
Conclusion	23

TABLE OF AUTHORITIES.

Cases.

Aeronautical Industrial Dist. Lodge 727 v. Campbell, 337 U. S. 521 (1949) 11,15,17

Atkinson v. Sinclair Refining Co., 370 U. S. 238 (1962) 19, 20, 21

Dowd Box Co. v. Courtney, 368 U. S. 502 (1962) 22

Drake Bakeries v. Local 50, American Bakery Workers, 370 U. S. 254 (1962) 19, 20, 21

Elder v. N. Y. Cent. R. R., 152 F. 2d 361 (6th Cir. 1945) 11, 17

Enterprise Wheel & Car Corp. v. United Steelworkers, 269 F. 2d 327 (4th Cir. 1959), rev'd on other grounds, 363 U. S. 593 (1960) 11, 16

Lewis v. Benedict Coal Corp., 361 U. S. 249 (1960) 21

Local Lodge No. 2040, Etc. v. Servel, Inc., 268 F. 2d 692 (7th Cir. 1959), cert. den., 361 U. S. 884 ..... 11, 16

Local 174, Teamsters Union v. Lucas Flour Co., 369 U. S. 95 (1962) 21, 22

Mastro Plastics v. N. L. R. B., 350 U. S. 270 (1956) 21

Metal Polishers Union v. Viking Equipment Co., 278 F. 2d 142 (3d Cir. 1960) 9, 10, 13-14, 15

N. L. R. B. v. Lion Oil Co., 352 U. S. 282 (1957) 21

System Federation No. 59 v. Louisiana & A. Ry., 119 F. 2d 509 (5th Cir. 1941), cert. den., 314 U. S. 656 ..... 11, 16

Textile Workers v. Lincoln Mills, 353 U. S. 448 (1957) 21

United Steelworkers v. American Mfg. Co., 363 U. S. 564 (1960) 21

Zdanok v. Glidden Co., 288 F. 2d 99 (2d Cir. 1961), *cert. granted on procedural grounds*, 368 U. S. 814; *aff'd* 370 U. S. 530 (1962) .....

Miscellaneous.

Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 17 Harvard Law Rev. 1532 (1962) 11

Lowden, *Survival of Seniority Rights Under Collective Bargaining Agreements, Zdanok v. Glidden Co.*, 48 Va. Law Rev. 291 (1962) 11

In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. 514.

JAMES ODDIE, EDWARD CWIERTNIEWICZ,
JOHN PENZAK, OSCAR KING,
HARRY C. BREMMER,

Petitioners,

v.

ROSS GEAR AND TOOL COMPANY, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

QUESTION PRESENTED.

Do the seniority rights of employees provided by the Detroit collective bargaining agreement of December 19, 1958, between Gemmer etc. and Local No. 80 U. A. W. apply to the Company's operations in Lebanon, Tennessee, upon a closing of the Company's plant located within the city limits of Detroit and the removal of a substantial portion of the equipment to a new plant in Lebanon, Tennessee?

STATUTE INVOLVED.

There is no federal statute involved in this action. Because jurisdiction of the District Court was invoked in this case on the ground of diversity of citizenship, Section 301(a) of the Labor-Management Relations Act, 61 Stat. 156 (1947), Title 29 U. S. C. Section 185(a) (1952) is not at issue in this matter.

STATEMENT OF THE CASE.

The "Statement of the Case" in the Petition (pp. 3-11) does not contain all of the facts material to the consideration of the questions presented.

Facts.

A substantial and significant omission in the recital of the facts is found in Petitioners' failure to include the bargaining history leading to the contract under which Petitioners seek to ascertain their rights. The importance of these facts is evident from the opinion of the Court of Appeals. (Pet. pp. 48-49; *Oddie et al. v. Ross Gear and Tool Company, Inc.*, 305 F. 2d 143, 150 (6th Cir. 1962))

Gemmer Manufacturing Company was an independent corporation until 1956, when it was purchased by Ross. (R. 86a.) Although the UAW has represented the employees at this Detroit plant since 1936 (R. 80a) the evidence was concerned with the collective bargaining contracts of 1948, 1951, 1955, and 1958, and the negotiations in connection therewith. (R. 79a.) The Petitioners' assertion that they should be given priority in employment at the new Lebanon, Tennessee, plant (referred to by Petitioners as seniority recall rights) is based upon their seniority which was created by the 1958 Detroit contract. (R. 7a.)

Respondent denied that the contract or any part of it applied outside the city limits of Detroit and based such denial upon the fact that those rights were applicable only to the plant (or plants) with respect to which the contract was made, and upon the preamble and the recognition portions of such contract as an express designation of the area of applicability of the contract and the rights thereunder.[1]

At the hearing in the trial court, a portion of the evidence was concerned with a change in the collective bargaining agreement between UAW and Gemmer in 1951 from the provisions of their agreement in 1947. The pre-

---

[1] "THIS AGREEMENT is entered into this 19th day of December, 1958, by and between GEMMER MANUFACTURING COMPANY (of Detroit, Michigan), which is a division of Ross Gear and Tool Company, Inc. (a corporation of Lafayette, Indiana), and which Gemmer is hereinafter referred to as the 'Company,' and the INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW (AFL-CIO), AND LOCAL 80, THEREOF, hereinafter referred to as the 'Union.'

"WHEREAS, the parties to this agreement desire to promote the spirit of harmony and cooperation between them and insure the most efficient operation of the Company's plant, the following agreement is entered into:

"RECOGNITION

"1. The Company recognizes the union as the exclusive representative of its employees *in its plant or plants which are located in that portion of the greater Detroit area which is located within the city limits of Detroit* for the purpose of collective bargaining on matters of wages, hours and conditions of employment, excluding those mentioned in the next succeeding paragraph. * * *

"19. Seniority shall be by departments except as herein specified." * * * "20 (e) Employees having one year or more of seniority at the time they are laid off can exercise plant-wide seniority in accordance with the following rules and procedures:" (Our emphasis.) (pp. 1, 11, 12 of the 1958 Collective Bargaining Agreement [hereinafter referred to as 1958 contract] which is bound into the Certified Record after R. 125a; see R. 9a.)

amble and recognition clause of the 1947 contract[2] set forth the street address of the Detroit factory of Gemmer and provided for the recognition of the Union as representative of the Company employees without any further limitation on application of the contract.

During the negotiations in connection with the 1951 agreement, the Union sought to delete the address from the preamble and to amend the recognition clause by describing the area covered by the contract as the Greater Detroit area. (R. 84a-85a.) The Union stated that the proposal was made to expand the application of the contract from the main factory at the Mt. Elliott Street address to include an experimental plant just outside the city limits of Detroit. (R. 85a.) The Company declined to accept the proposal as made, but did agree to amend the preamble and recognition clause in the 1951 collective bar-

---

[2] "THIS AGREEMENT is entered into this 21st day of August, 1947, by and between Gemmer Manufacturing Company, 6400 Mt. Elliott Avenue, Detroit, Michigan, hereinafter referred to as the 'Company,' and the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO) and Local No. 80 thereof, affiliated with the Congress of Industrial Organizations, hereinafter referred to as the 'union.'

"WHEREAS, the parties to this agreement desire to promote the spirit of harmony and cooperation between them and insure the most efficient operation of the Company's plant, the following agreement is entered into:

"RECOGNITION

"1. The Company recognizes the union as the exclusive representative of its employees for the purpose of collective bargaining on matters of wages, hours and conditions of employment, excluding those mentioned in the next succeeding paragraph.

"2. For the purpose of this agreement the term 'employees' shall not include direct representatives of the management, such as superintendents, foremen, assistant foremen, nor time study men, plant protection employees, watchmen, time-keepers who also act in the capacity of payroll clerk nor employees in the administrative office building, except those workers on factory payroll in experimental department." (Pl. Ex. A; R. 81a-82a, 109a-110a.)

gaining agreement. The change deleted the address from the preamble and described the area covered by the agreement as the plant or plants located in that portion of the Greater Detroit area within the city limits of Detroit.[3] The parties recognized that the revised language of the contract restricted the contract to the city limits of Detroit, so that it did not extend to the experimental plant located outside the Detroit city limits. (R. 85a.)

At the time of negotiating the 1955 collective bargaining agreement, the UAW again proposed to increase the scope of the recognition clause to cover all plants of the Company in the Greater Detroit area by deleting the reference to the city limits. (R. 111a.) This proposal was again rejected and the language of the 1951 contract was con-

---

[3] THIS AGREEMENT is entered into this 11th day of May, 1951, by and between Gemmer Manufacturing Company, Detroit, Michigan, hereinafter referred to as the 'Company,' and the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO) and Local No. 80 thereof, affiliated with the Congress of Industrial Organizations, hereinafter referred to as the 'Union.'

"WHEREAS, the parties to this agreement desire to promote the spirit of harmony and cooperation between them and insure the most efficient operation of the Company's plant, the following agreement is entered into:

"RECOGNITION

"1. The Company recognizes the Union as the exclusive representative of its employees in its plant or plants which are located in that portion of the greater Detroit area which is located within the city limits of Detroit for the purpose of collective bargaining on matters of wages, hours and conditions of employment, excluding those mentioned in the next succeeding paragraph.

"2. For the purpose of this agreement the term 'employees' shall not include direct representatives of the management, such as superintendents, foremen, assistant foremen nor time study men, plant protection employees, watchmen, nor employees in the administrative office building, except those workers on factory payroll in experimental department." (Pl. Ex. 2; R. 83a-84a, 110a-111a.)

tinued in the 1955 contract. It was during the period of this contract that Ross purchased Gemmer. (R. 95a.)

The only negotiations with the UAW subsequent to the purchase of Gemmer by Ross occurred in 1958 when the contract upon which Petitioners sue was negotiated. (R. 3a.) In these negotiations, the Union again sought to amend the recognition clause by deletion of the city limits provisions but also sought the addition of two new subparagraphs to the first clause of the recognition section.[4] The subparagraphs proposed were concerned directly with the problems of seniority transfers in the event the Company moved its operations to other locations, or in the event the Company created plants or facilities at any other location.

A witness for the Petitioners testified that these proposals were made to give protection to the Detroit employees so that if the Company did move there would be "no danger of anybody losing his position." (R. 87a.) The Petitioners' witness testified further that he was aware that there was no legal protection to the employees from a transfer of operations if these subparagraphs were not adopted (R. 90a), and that no part of the contract would cover a plant just outside the city limits of Detroit. (R. 92a.) Mr. Oddie, one of the Petitioners, testified that the

---

[4] "(a) *In the event the company creates other plants or facilities regardless of location* under the administration of the company, the union shall be recognized for the purpose of collective bargaining on matters of wages, hours, conditions of employment, *seniority transfers*, and all matters embodied in this agreement.

"(b) *In the event the company moves its operations to other locations*, the union shall be recognized for the purpose of collective bargaining on matters of wages, hours, and conditions of employment. Should this condition occur this matter will be subject to negotiations between the company and the union, such as moving costs of employees, severance pay, *seniority transfers*, and all other matters pertaining to this situation." (Our emphasis.) (Def. Ex. 2, R. 112a, 99a.)

purpose of the proposal was to extend coverage of the contract to a plant that was not covered otherwise by the contract. (R. 109a.)

These proposals were rejected by the Company (R. 100a-101a) and were not included in the 1958 collective bargaining contract (p. 1-58, 1958 Contract).

The Proceeding Before the District Court.

Petitioners filed a class action on behalf of themselves, and others similarly situated, in the United States District Court, Eastern District of Michigan, for a preliminary injunction and declaratory relief. (Pet., pp. 5-6.) This action was based upon diversity jurisdiction and was not brought under Section 301(a) of the Labor-Management Relations Act. (61 Stat. 156 (1947); 29 U. S. C. § 185(a) 1952)) It is clear however, that Petitioners relied upon *Zdanok v. Glidden Co.*, 288 F. 2d 99 (2d Cir. 1961), *cert. granted on procedural grounds*, 368 U. S. 814; *aff'd* 370 U. S. 530 (1962) rather than the provision of the 1958 contract as the foundation of their cause. (R. 7a; R. 40a.)[5]

It is equally clear that the District Court founded its decision upon its interpretation of that case. In concluding that Petitioners and other Detroit employees had seniority recall rights at the new Lebanon, Tennessee, plant, the court stated:

> "But the issue at the moment evolves about the proposition as to whether or not the contract can be annulled unilaterally by the mere moving of the Defendant's plant to another state.

---

[5] "And, as you know, as I have indicated, our argument in favor of the application of these employees' seniority rights is not based or tied to the carrying of this contract to Lebanon, Tennessee. It is based on vested rights which these employees have and will carry with them whether or not the contract is moved to Lebanon, Tennessee." (Argument of Petitioners' attorney. R. 66a.)

"To be consistent with the *Glidden* case, *supra*, if that were the only issue, the answer would obviously be 'No'." (R. 114a.)

* * * * *

"This Court feels bound by the *Glidden* case, *supra*, and its reasoning, and since there is nothing within the contract now in force to the contrary, those seniority rights are to continue." (R. 118a.)

"Therefore, the contract being not to the contrary, and pursuant to the holding in the *Glidden* case, *supra*, defendant has an obligation and duty to rehire on the basis of seniority those employees laid off in Detroit when that plant's operations are removed to Lebanon, Tennessee." (R. 120a.)

The Proceeding Before the Court of Appeals.

In the Court of Appeals Petitioners admit that they again "* * * relied heavily on Glidden." (Pet., p. 9)

Contrary to the statement in the Petition (Pet., p. 10) the Court of Appeals did not rely *solely* upon the language "plant or plants which are located in that portion of the greater Detroit area which is located within the city limits of Detroit." This language was merely one of a number of factors upon which the Court of Appeals relied in its interpretation of the 1958 contract.

It is evident from the opinion that the court attached considerable importance to the language quoted since the Petitioners themselves had conceded at the hearing below that no part of the contract applied to an existing plant just outside the city limits of Detroit (Pet., pp. 44-45; 305 F. 2d 143, 148). The significance of this language was also enhanced by the fact that it was designed to cover employees at any plants which the Company might have within the area described and was not merely a description of an existing facility. (Pet., pp. 45-46; 305 F. 2d 143, 149.)

The Court of Appeals attached considerable significance to the collective bargaining history which preceded the 1958 contract including the attempt by the Union specifically to cover the question of transfer of seniority in negotiating the 1958 contract. (Pet., pp. 48-49; 305 F.2d 143, 150.) The Court of Appeals was also assisted in its interpretation of the contract by the fact that the Union had merely requested that employees affected by the transfer of the plant be given an opportunity to go to Lebanon, Tennessee, while after the decision of the Court of Appeals for the Second Circuit in *Glidden*, this request became a "* * * claim that such rights existed under the ruling in that case." (Pet., pp. 49-50; 305 F. 2d 143, 150-151.)

From these factors the Court of Appeals concluded:

> "Under our construction of the agreement the employees acquired no seniority rights under the 1958 agreement as employees at the Tennessee plant. Since no rights were acquired, we do not reach the question of any rights being cut off by unilateral action on the part of the defendant, either during the existence of the bargaining agreement or after its expiration." (Pet., p. 48; 305 F. 2d 143, 150.)

Such construction was, in the opinion of the Court of Appeals, in accord with the construction which the parties themselves had given to the contract as shown by their actions thereunder. (Pet., p. 50; 305 F. 2d 143, 151.)

The opinions of the Courts of Appeals for the Second and Third Circuits in *Glidden* and *Metal Polishers Union v. Viking Equipment Co.*, 278 F. 2d 142 (3d Cir. 1960) were distinguished by the Court of Appeals for the Sixth Circuit as cases involving interpretations of contracts materially different from that before it. (Pet., p. 46; 305 F. 2d 143, 149.)

The Petitioners, in their description of the opinion of the Court of Appeals below, would lead this Court to believe that the opinion was based solely upon a state common law rule of commercial contracts (Petition, p. 11), while in fact those cases were cited by the Court of Appeals for the universally applicable rule that:

> "We must construe the contract as it is written, rather than make a new contract for the parties." (Pet., p. 45; 305 F. 2d 143, 148.)

Not one case from any jurisdiction is cited in the Petition as contrary to this rule.

ARGUMENT.

A. THERE IS NO CONFLICT BETWEEN COURTS OF APPEAL.

1. Introduction.

The Petitioners, in asserting that there is a conflict between the Courts of Appeal for the Second and Third Circuits[6] and the opinion of the Court of Appeals for the Sixth Circuit below, confuse a rule of law with a result in a case. It is true that the result reached by the court below differed from the result reached by the Courts of Appeal for the Second and Third Circuits but not because of an application of conflicting rules of law but rather because of the application of the same rule of law to different factual situations presented by different collective bargaining contract provisions.

It is universally recognized that seniority rights of employees are contractual in their origin and that their scope and significance are to be determined by reference

---

[6] *Zdanok v. Glidden Co.*, 288 F. 2d 99 (2d Cir., 1961), *cert. granted on procedural grounds*, 368 U. S. 814; *aff'd* 370 U. S. 530 (1962); *Metal Polishers Union v. Viking Equipment Co.*, 278 F. 2d 142 (3d Cir, 1960).

to the contract creating them. Thus Mr. Justice Frankfurter in describing seniority in *Aeronautical Industrial Dist. Lodge 727 v. Campbell*, 337 U. S. 521 (1949), in speaking for this Court, said:

> "Barring legislation not here involved, seniority rights derive their scope and significance from union contracts, confined as they almost exclusively are to unionized industry." [7] (337 U. S. 521, 526.)

From application of this universal rule different results may arise as contract provisions vary, but conflicts between Courts of Appeal do *not* thereby arise.

2. The Court of Appeals for the Second Circuit.

Much has been said about the decision of the Court of Appeals for the Second Circuit in *Glidden* both in the Petition and elsewhere.[8] This action was based upon that decision of the Court of Appeals for the Second Circuit. (R. 7a, 40a-44a.) The Court has had an opportunity to examine that case.[9] Respondent asserts that such case is authority for the proposition that the scope, nature and extent of seniority, including seniority rights, must be determined from a construction of the contract creating such rights.

---

[7] Accord: *Local Lodge No. 2040, Etc. v. Servel, Inc.*, 268 F. 2d 692 (7th Cir. 1959), *cert. den.*, 361 U. S. 884; *Elder v. N. Y. Cent. R. R.*, 152 F. 2d 361 (6th Cir. 1945); *System Federation No. 59 v. Louisiana & A. Ry.*, 119 F. 2d 509 (5th Cir. 1941) *cert. den.*, 314 U. S. 656; *Enterprise Wheel & Car Corp. v. United Steelworkers*, 269 F. 2d 327 (4th Cir. 1959), *rev'd on other grounds*, 363 U. S. 593 (1960).

[8] Pet., pp. 2, 5, 9, 10, 12, 20, 21, 25, 26, 28, 29, 32, and 33; Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 17 Harvard Law Rev. 1532 (1962); Lowden, *Survival of Seniority Rights Under Collective Bargaining Agreements, Zdanok v. Glidden Co.*, 48 Va. Law Rev. 291 (1962).

[9] The Court denied certiorari on the merits of the opinion of the Second Circuit and granted certiorari limited to a procedural question. 368 U. S. 814.

Judge Madden, on behalf of the majority, in deciding the issue of the seniority rights asserted by employees in that case analyzed the Glidden collective bargaining agreement as follows:

> "The union contract, in its preamble, recited that it was made by the defendant company
>
> > 'for and on behalf of its plant facilities located at Corona Avenue and 94th Street, Elmhurst, Long Island, New York.'
>
> "*If this narrow geographical description is treated as setting fixed boundaries upon the scope of the contract, difficulties immediately arise.* * * *
>
> > "A rational *construction of the contract* would seem to require that the statement of location was nothing more than a reference to the then existing situation, and had none of the vital significance which the defendant would attach to it. Contracts must, in all fairness, be construed *ut res magis valeat quam pereat*. If not, the reasonable expectations of the parties are sacrificed to sheer verbalism." (Our Emphasis.) 288 F. 2d 99, 103-104.

The "narrow geographical description" (Corona Avenue and 94th Street) in the Glidden contract was found by Judge Madden to be nothing more than an identifying address which the court refused to treat as "setting fixed boundaries on the scope of the contract." But this conclusion is based upon a construction of that contract by that court.

The *Glidden* opinion is authority only for the legal proposition that the scope, nature, and extent of seniority transfer rights, like all other rights arising out of collective bargaining contracts, must be determined from a construction of the contract creating them. With this proposition the Respondent agrees. Since the Gemmer contract was materially different from the Glidden contract, the

situation presented for decision by the Sixth Circuit was wholly different.

If any comfort is to be drawn from the analysis by Judge Madden quoted above it must be by Respondent. The 1958 Gemmer contract and the evidence demonstrated that the geographical description in such contract was intended to fix the boundary on the scope of the contract and hence the rights thereunder.[10] Because the parties to the Glidden contract failed to draw such boundaries, the Court of Appeals for the Second Circuit refused to draw the boundaries for them. Because the parties to the Gemmer contract *did* draw its boundaries, the Court of Appeals for the Sixth Circuit refused to erase those boundaries and rewrite the Gemmer contract by judicial decision.

The Court of Appeals below and the Court of Appeals for the Second Circuit in *Glidden* applied the same universal principle that seniority rights must be determined from an interpretation of the contract, but a different result was reached by the two courts for the reason stated by the court below:

> "In that respect the agreement in the Glidden Company case is materially different from the agreement in the present case, and in our opinion is not applicable on this phase of the case." (Pet., p. 46; 305 F. 2d 143, 149.)

There is no conflict between the Courts of Appeal for the Second and Sixth Circuits on the questions herein involved.

3. The Court of Appeals for the Third Circuit.

The other case which Petitioners assert is in conflict with the opinion of the Court of Appeals below is the *per curiam* opinion of the Third Circuit in *Metal Polishers*

---

[10] See discussion of facts, pp. 2-7, *supra*.

Union v. Viking Equipment Co., 278 F. 2d 142 (3d Cir. 1960).[11]

The District Court in the "oral conclusions" in *Viking*, quoted in the Petition, held:

> "In the court's estimation, an examination of the contract leads the court to the conclusion that it is implicit therein that *the contract applies to the area in which the company was then doing business.*" (Our emphasis.) (Pet., p. 27; opinion not reported.)

The preamble of the contract, also set forth in the Petition, provided in part:

> "Agreement entered into this First day of June, 1957, between Viking Company, doing business in East Orange, *and* in the State of New Jersey, * * *" (Our emphasis.) (Pet., p. 27.)

The Court of Appeals for the Third Circuit pointed out that the move in question was from East Orange, New Jersey, to Pennsauken, New Jersey.[12]

In reversing the District Court it held:

> "We disagree *with the district judge in his interpretation of the contract.* We do not think it is to be *interpreted* as applicable only to Defendant's activities in *East Orange,* New Jersey." (Our emphasis.) (278 F. 2d 142, 143.)

Respondent's position with respect to this authority is the same as its position with respect to *Glidden.* The opinion of the Court of Appeals for the Third Circuit is authority for the proposition that the area of applicability of a collective bargaining contract must be determined by an *interpretation of the terms of the contract.* The application of this principle to the Viking contract

---

[11] Pet., pp. 2, 3, 12, 25, 27, 28, 30.

[12] *Metal Polishers Union v. Viking Equipment Co.*, 278 F. 2d 142 (3d Cir. 1960).

may be fairly characterized as: "East Orange *and* the State of New Jersey is a broad area description which includes the area within the city limits of East Orange, New Jersey, so that upon any plant relocation *within* the State of New Jersey the contract remains in force." With this contract interpretation the Court of Appeals for the Sixth Circuit did not disagree.

As held by the court below:

> "In *Metal Polishers, etc. v. Viking Equipment Co.*, 278 F. 2d 142, C. A. 3rd, also relied upon by the plaintiffs, it appears that the new location of the plant involved was still within the geographical limits referred to in the collective bargaining agreement, which, of course, is vitally different from the situation which we are considering in the present case." (Pet., p. 46; 305 F. 2d 143, 149.)

There is no conflict between the Court of Appeals for the Third Circuit and the Court of Appeals for the Sixth Circuit on the questions herein involved.[13]

4. Conclusion.

This Court[14] and the Courts of Appeal for the Second, Third, and Sixth Circuits agree that the scope and significance of the many rights created under collective bar-

---

[13] It should be noted that *Viking* involved an action by a Union under § 301 of the Labor Management Relations Act [Title 29 U. S. C. § 185 (a)] for money damages, to compel mediation pursuant to the contract and for injunction to prevent a contract with another union for the relocated plant. (278 F. 2d 142.) It is clear that the plaintiff union was asserting that the *entire contract* was applicable to the relocated plant which was within the area described in the contract. So also would the *entire* Gemmer contract have applied to any relocated plant within the city limits of Detroit, the area described in its contract.

[14] *Aeronautical Industrial Dist. Lodge 727 v. Campbell*, 337 U. S. 521 (1949).

gaining contracts are to be determined from a construction of the contract. Such principle is not in conflict with opinions of other circuits[15] and such a rule must govern if there is to be any certainty for the parties to such contracts.

B. NO IMPORTANT QUESTION OF FEDERAL LAW IS INVOLVED.

1. Introduction.

In its Rule 19, this Court has set forth the character of reasons which will be considered in determining whether special and important reasons exist for granting review on writ of certiorari. This case falls neither within the specific reasons nor the policy enunciated in the Rule.[16]

The Court of Appeals below determined the meaning of a particular collective bargaining contract within the framework of the contractual terms and the collective bargaining history from which those terms were developed. Such a decision, by its very nature, is applicable only to its particular situation and cannot have general applicability. This decision was based upon principles of law *common to both state and federal law.* The decision is not one of general significance.

---

[15] *Enterprise Wheel & Car Corp. v. United Steelworkers,* 269 F. 2d 327 (4th Cir. 1959), *rev'd on other grounds,* 363 U. S. 593 (1960); *System Federation No. 59 v. Louisiana & A. Ry.,* 119 F. 2d 509 (5th Cir. 1941) *cert. den.,* 314 U. S. 656; *Local Lodge No. 2040, Etc. v. Servel, Inc.,* 268 F. 2d 692 (7th Cir. 1959), *cert. den.,* 361 U. S. 884.

[16] The Court of Appeals for the Sixth Circuit did *not* render a decision in conflict with another court of appeals (pp. 10-15, *supra*), nor did it *decide* an important question of federal law, decide a federal question in conflict with this Court, or depart from procedures which call for an exercise of this Court's power of supervision. Rule 19.

2. Seniority Under the Gemmer Contract.

There is no doubt that any seniority rights of the Petitioners must be based upon the contract from which they originated and from which their scope and significance are to be determined.[17] Without a collective bargaining contract the Petitioners would not have seniority rights.[18]

The provisions of the Gemmer contract which related to seniority spelled out in considerable detail their nature and extent.[19] Generally, seniority under that contract is departmental[20] but may become plant-wide except for skilled trades classifications.[21] Nowhere in the contract was it provided that seniority or any other rights created by the contract were applicable Company-wide or to a plant located outside the city limits of Detroit.

The portion of seniority which the Petitioners seek to assert is a right to exercise the recall to work provisions of the Detroit Gemmer contract at Lebanon, Tennessee (R.

---

[17] *Aeronautical Industrial Dist. Lodge 727 v. Campbell*, 337 U. S. 521 (1949).

[18] *Elder v. N. Y. Cent. R. R.*, 152 F. 2d 361 (6th Cir. 1945), at 364 wherein the court held:

> "The seniority right of the man who toils, indoors or out, in a shop or in an office, is a most valuable economic security, of which he may not be unlawfully deprived. *The right, however, is not inherent.* It must stem either from a statute or a lawful administrative regulation made pursuant thereto, or from a contract between employer and employee, or from a collective bargaining agreement between employees and their employer. In the absence of statute, mere employment independent of the contractual conferring of special benefits upon those who have longest service records with the individual employer, creates no rights of seniority in retention in service or in reemployment." (Our emphasis.)

[19] 1958 contract, pp. 10-28.

[20] Ibid., ¶ 19, p. 11.

[21] Ibid., ¶ 20 (e) p. 12, ¶ 20 (1), p. 14.

7a), but they do not cite any portion of the Gemmer contract providing for the application of these seniority recall rights at Lebanon, Tennessee, nor can they cite any such portion. They are alleged to be applicable *solely* "* * * under the doctrine of *Zdanok v. Glidden Co.*, 288 F. 2d 99 (2nd Cir. 1961) * * *" (R. 7a; R. 40a; R. 66a.)

The UAW, which was the collective bargaining agent for Petitioners, was well aware of the method by which seniority may be transferred upon a plant relocation *that is*: through a provision of the contract creating such rights. Pursuant to their announced intention to obtain provisions in collective bargaining agreements providing for transfer of seniority upon plant relocation,[22] the Union proposed an addition to the Gemmer contract in 1958 to extend seniority if there was a plant relocation.[23] This effort failed.[24] Petitioners now contend that since the contract is silent in this respect they have the right to assert seniority in Tennessee. To do this they confuse what they designate the "doctrine" or "rule" of the *Glidden* case with its *result*.

The Court of Appeals for the Sixth Circuit held that the Gemmer contract and *all* rights thereunder were

---

[22] In the 1958 UAW convention the delegates approved as one of their bargaining aims for 1958 the following: "As to plant relocations, the UAW wants these guarantees: (1) Right of an employee to transfer to the new location with full seniority rights, including pensions, insurance, and SUB credits accumulated at the old plant; (2) recognition of the UAW as the bargaining agent at the new plant with maintenance of contract standards and comparable wage rates; (3) compensation to the worker for the cost of moving his family to the new plant; (4) adequate severance pay to cover the readjustment period for those workers who elect not to make the transfer; and (5) area-wide seniority in multi-plant companies to facilitate transfers." (39 L. R. R. M. 41 (1948))

[23] See 1958 Union proposals, *supra*, Footnote 4.

[24] See p. 1, 1958 contract.

restricted to the city limits of Detroit. This decision was based upon an *interpretation* of that contract in light of the evidence relating thereto, and this *result* is not in conflict with the "*rule*" of *Glidden*. The rule requiring that effect be given to the intention of the parties to the contract is common to "state law" *and* to "federal law."

3. The Result Below Is Based Upon the Application of a Principle of Law That Is Both State and Federal.

The rule of the Court of Appeals for the Sixth Circuit is not a "novelty,"[25] an "innovation,"[26] or a "clear departure from well settled concepts."[27] The rule applied by the Court of Appeals for the Sixth Circuit in reaching its result is in accord with every *federal* and *state* decision which has concerned itself with the problem of seniority. That the results of the application of this rule are not always uniform does not indicate a conflicting rule but rather reflects the fact that the provisions of collective bargaining contracts vary. In the absence of the uniformity of such contracts there can be no "rule of law," federal or state, which answers the question of whether or not seniority rights will transfer to a relocated plant under *all* contracts. The "federal law" and "state law" are the same.

The general principle is illustrated by two recent decisions of this Court handed down the same day.[28] In *Sinclair* an employer brought an action under Section 301 for damages arising out of a breach of a no-strike clause in

---

[25] Pet. p. 23.

[26] Ibid., p. 25.

[27] Ibid., p. 23.

[28] *Drake Bakeries v. Local 50, American Bakery Workers*, 370 U. S. 254 (1962); *Atkinson v. Sinclair Refining Co.*, 370 U. S. 238 (1962).

a collective bargaining contract. The union sought to have the action dismissed because the issue was arbitrable. In interpreting the provisions of that contract, this Court, in holding the issue was not arbitrable, found:

> "We think it unquestionably clear that the contract here involved is not susceptible to a *construction* that the company was bound to arbitrate its claim for damages against the union for breach of the undertaking not to strike." (Our emphasis.) (370 U. S. 238, 241.)

In the *Drake Bakeries* case, an employer also sought damages from a union in an action under Section 301 for breach of a no-strike clause in *their* contract. This Court, in determining the issue to be arbitrable under *that* contract, determined:

> "Moreover, in this case, *under this contract,* by agreeing to arbitrate all claims without excluding the case where the union struck over an arbitrable matter, *the parties have negatived any intention* to condition the duty to arbitrate upon the absence of strikes." (Our emphasis.) (370 U. S. 254, 261, 262.)

Thus, opposite results were reached the same day, in *Sinclair* and *Drake Bakeries* from the application of the universal principle that the rights and obligations of the parties to collective bargaining contracts shall be determined from construction of those contracts.

The Petitioners ask the Court to "* * * review general rules of interpretation for two of the most basic provisions found in all collective bargaining contracts: the recognition clause and the seniority provision." But the general rules for interpretation of *these* provisions and *all* provisions of collective bargaining agreements have been laid down: *The function of the courts is to determine the intent of the parties to the contract and to give effect to that*

intent.[29] This was done by the Court below. There is *no* authority or federal policy to the contrary.

4. This Action Has Not Been Brought Under Section 301(a).

In *Lincoln Mills* the Court determined that the substantive law to apply in suits under Section 301(a) is federal law.[30]

This is not an action, however, *under* Section 301(a). The Petitioners herein brought suit on behalf of all employees as a class against their employer and based jurisdiction upon diversity of citizenship and the amount in controversy.[31] The issue of whether this action *could* have been brought under Section 301(a) was not presented for decision below and was not decided by either the Dis-

---

[29] **Arbitration clauses:**

United Steelworkers v. American Mfg. Co., 363 U. S. 564, 567, 568 (1960). "The function of the court is very limited *when the parties have agreed* to submit all questions of contract interpretation to the arbitrator."

Atkinson v. Sinclair Refining Co., 370 U. S. 238, 241 (1962). "Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties. * * *"

Drake Bakeries v. Local 50, American Bakery Workers, 370 U. S. 254 (1962).

No strike clause:

Mastro Plastics v. N. L. R. B., 350 U. S. 270, 279 (1956). "The answer turns upon the proper *interpretation of the* particular contract before us."

Accord:

Lewis v. Benedict Coal Corp., 361 U. S. 249 (1960).
N. L. R. B. v. Lion Oil Co., 352 U. S. 282 (1957).
Local 174, Teamsters Union v. Lucas Flour Co., 369 U. S. 95 (1962).

[30] *Textile Workers v. Lincoln Mills*, 353 U. S. 448, 456 (1957).

[31] R. 2a; Title 28 U. S. C., § 1332(a) (1958).

trict Court or the Court of Appeals for the Sixth Circuit. With respect to this jurisdictional question, the Petitioners have not brought themselves within the letter or intent of Rule 19 of this Court and, in effect, seek an advisory opinion.

In citing *Dowd Box*[32] and more especially *Lucas Flour* they seek to overcome the reluctance of this Court to give advisory opinions. In *Local 174; Teamsters Union v. Lucas Flour Co.*, 369 U. S. 95 (1962), the Court held that federal law applied to actions in state courts between employers and unions and that doctrines of federal labor law must universally prevail over inconsistent local rules. But in that case the state court had expressly applied principles of state law.[33]

The Court of Appeals for the Sixth Circuit did not expressly characterize its decision as "state law" or "federal law." Nor had it been asked to do so by Petitioners, and the result of this case would have been no different had the Court of Appeals done so. The authorities cited by the Court and the principles applied were common to both state law and federal law. Merely because the Court failed to label its opinion the Petitioners now ask this Court to grant certiorari and attach the label to it—not because this is necessary to prevent other courts from being misled into applying conflicting rules of state law, not because the Court of Appeals below failed to respond to a request by Petitioners that it determine federal law applied, not because Petitioners based their action on Section 301 and not because they assert that the Court of Appeals below wrong-

---

[32] *Dowd Box Co. v. Courtney*, 368 U. S. 502 (1962).

[33] Although these state law principles were not found to conflict with federal law so that the result remained the same, it is clear that a state court had decided a federal question of substance not theretofore determined by this Court. (Rule 19, 1 (a))

ly interpreted the intent of the parties to this contract—but because the Petitioners find it necessary to go to great lengths to assert the existence of a federal question which actually is not involved.

5. Conclusion.

The Court below reached its decision by applying principles of law common to both the state and federal systems. It ascertained the intention of the parties to a collective bargaining contract pursuant to the law requiring it to do so, and, from the intention thus determined, decided that the Gemmer collective bargaining agreement and all rights thereunder applied only within the city limits of Detroit. This determination of intention from undisputed facts does not have general application nor does it represent a federal question of special and important effect.

CONCLUSION.

For the foregoing reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

OWEN J. NEIGHBOURS,
JAMES M. NICHOLSON,
Counsel for Respondent.

Of Counsel:

CADICK, BURNS, DUCK & NEIGHBOURS.

November 13, 1962.

LIBRARY

Office-Supreme Court, U.S.
FILED
NOV 23 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 514

JAMES ODDIE, EDWARD CWIERTNIEWICZ,
JOHN PENZAK, OSCAR KING,
HARRY C. BREMMER,
Petitioners,

v.

ROSS GEAR AND TOOL COMPANY, INC.,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' BRIEF IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

HAROLD A. CRANEFIELD,
JOHN A. FILLION,
Counsel for Petitioners,
8000 E. Jefferson Avenue,
Detroit 14, Michigan.

GORDON A. GREGORY,
ROBERT S. ROSENFELD,
Of Counsel,
8000 E. Jefferson Avenue,
Detroit 14, Michigan.

Interstate Brief & Record Co., 356 Congress St. E., Detroit 26, Michigan

CITATIONS

Cases:

	Page
Local 174, Teamsters Union v. Lucas Flour Co., 369 U.S. 95	3, 7
Metal Polishers Union v. Viking Equipment Co., 278 F. 2d 142 (3d Cir. 1960)	7
Sivyer Steel Casting Co., 39 Lab. Arb. 449 (Oct. 10, 1962)	1, 3, 4, 5, 6
United Steel Workers v. American Manufacturing Co., 363 U.S. 564	3
Zdanok v. Glidden Co., 288 F. 2d 99 (2d Cir. 1961), cert. granted on other grounds, 368 U.S. 814	5, 7

Miscellaneous:

BNA Collective Bargaining Negotiations and Contracts (Basic Patterns in Union Contracts) Vol. 2	6
Levett, Treatment of Monetary Fringe Benefits and Post-Termination Survival of the Right to Job Security, 72 Yale L. J. 162 (Nov., 1962)	1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 514

JAMES ODDIE, EDWARD CWIERTNIEWICZ,
JOHN PENZAK, OSCAR KING,
HARRY C. BREMMER,
Petitioners,

v.

ROSS GEAR AND TOOL COMPANY, INC.,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' BRIEF IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

ARGUMENT

We file this reply brief to call the Court's attention to an arbitration decision handed down on October 10, 1962, and first published on November 9, 1962, subsequent to the filing of the petition herein: *Sivyer Steel Casting Co.*, 39 Lab. Arb. 449.[1]

[1] Also published since the filing of the petition herein is a comprehensive comment on some of the questions involved in the instant case, Levett, *Treatment of Monetary Fringe Benefits and Post Termination Survival of the Right to Job Security*, 72 Yale L. J. 162 (Nov. 1962).

The significance of the decision lies in the fact that in it the arbitrator follows the new rule of collective bargaining contract interpretation enunciated by the Sixth Circuit in the instant case. The decision is, therefore, concrete evidence that the Sixth Circuit, in interpreting the collective bargaining contract in the instant case, laid down a general rule of interpretation and did not merely make a "determination of intention from undisputed facts[2] [which] does not have general application nor . . . represent a federal question of special and important effect", as Respondent argues.[3]

---

[2] Throughout its brief Respondent places elaborate emphasis on its history of bargaining with the Union and argues that it is one of the factors upon which the court below based its interpretation of the contract. The court itself, however, made it plain that this is *not* what it did; that, instead, it based its interpretaton exclusively on the language of the recognition clause and, after having completed its interpretaton, noted that it appeared to be in accord with the parties' bargaining history:

> "The collective bargaining agreement provides that the Company recognizes the Union as the exclusive representative 'of its employees in its plant or plants which are located in that portion of the greater Detroit area which is located within the city limits of Detroit for the purposes of collective bargaining, * * *' *This is plain, unambiguous language.* The agreement gave seniority and 'recall-to-work rights to employees in the defendant's plants which were within the city limits of Detroit. It gave no such rights to employees of a plant in Tennessee." (Petition, p. 44; emphasis supplied)
>
> *"The construction which we are presently giving to the collective bargaining agreement appears to be in accord* with the construction also given to it by the Union until shortly before the filing of this action." (Petition p. 48; emphasis supplied)

In these statements the court made it absolutely clear that its interpretation of the contract was based on the language of the recognition clause and not on bargaining history and would have been the same had there been no bargaining history at all. The court also made it clear that similar recognition clauses will receive the same interpretation.

[3] Brief for Respondent, p. 23.

Respondent, in addition to arguing that the Sixth Circuit did not lay down a general rule of interpretation in the instant case, appears to go

(Continued on next page)

The new rule of collective bargaining contract interpretation laid down by the Sixth Circuit in the instant case and followed by the arbitrator in *Sivyer* is the one discussed

---

(Continued from preceding page)

so far as to argue that in fashioning the federal law of collective bargaining contracts the courts are not to fashion general rules of interpretation but are, instead, to apply the ordinary rules of interpretation applicable to other types of contracts:

> "The Petitioners ask the Court to '* * * review general rules of interpretation for two of the most basic provisions found in all collective bargaining contracts: the recognition clause and the senority provision'. *But the general rules for interpretation of these provisions and all provisions of collective bargaining agreements have been laid down.* . . ." (Brief for Respondent, pp. 20-21; emphasis supplied)

This Court has made it clear that the body of substantive law the lower federal courts and state courts are to fashion in response to the *Lincoln Mills* directive is to include general rules for the interpretation of this special kind of contract, the collective bargaining contract. In *United Steel Workers v. American Manufacturing Co.*, 363 U.S. 564, 567, the Court was quite explicit:

> "In our role of developing a meaningful body of law to govern *the interpretation* and enforcement of collective bargaining agreements . . . ." (Emphasis supplied)

And in *Local 174, Teamsters Union v. Lucas Flour Co.*, 369 U. S. 95, 103-04, the Court made this comprehensive statement about the importance of the rules of interpretation to be included in the new body of law:

> "More important, the subject matter of §301(a) 'is peculiarly one that calls for uniform law.' [Citations omitted]. The possibility that *individual contract terms might have different meanings* under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract. Once the collective bargain was made, the possibility of *conflicting substantive interpretation* under competing legal systems would tend to stimulate and prolong disputes as to its *interpretation*. [Citation omitted]. Indeed, the existence of possibly conflicting legal concepts might substantially impede the parties' willingness to agree to contract terms providing for final arbitral or judicial resolution of disputes." (Emphasis supplied)

under Question No. 2 in the petition.[4] It is the rule that the recognition clause of a collective bargaining contract (in addition to describing the bargaining unit of employees represented by the recognized union and covered by the contract) has the implied function of delineating the geographic area within which those employees can exercise their seniority-recall rights. As elaborated upon in the petition, this rule assigns to the provision which is the keystone of all collective bargaining contracts and has a traditional, specialized function a completely new, implied function which it has never before been regarded as having.

In *Sivyer* the employer's plant was located in Chicago. The employer was forced to vacate it when it became certain that a new expressway would run through the land on which the plant was standing. The operations of the plant were moved to an existing plant in Bettendorf, Iowa. The union claimed, among other things, that the seniority-recall rights the Chicago employees had at the Chicago plant would not be cut off by the movement of the plant's operations to Bettendorf so that they could exercise them there and would be entitled to recall at Bettendorf when the Chicago operations resumed there.

The arbitrator rejected this claim and in doing so consciously followed the course of collective bargaining contract interpretation inaugurated by the Sixth Circuit in the instant case. In answering the question of whether the Chicago employees' seniority-recall rights were cut off by the move to Bettendorf or continued to adhere to the plant at its new location, the arbitrator completely ignored the seniority provisions of the contract and went straight to the recognition clause. It read:

---

[4] Petition, pp. 22-28.

> "The Company agrees to recognize the Union as the sole collective bargaining agency for all production and maintenance employees in the Chicago, Illinois plant."[5]

He compared it to the recognition clause the Sixth Circuit interpreted in the instant case:

> "The Company recognizes the Union as the exclusive representative of its employees in its plant or plants which are located in that portion of the greater Detroit area which is located within the city limits of Detroit."

He noted that the Sixth Circuit's ruling that the recognition clause placed limitations upon the employees' seniority-recall rights was in conflict with the Second Circuit's *Glidden*[6] rule that recognition clauses do not perform that function.[7] Although later noting a factual distinction between *Glidden* and the case before him, he followed the Sixth Circuit and found that the reference to "Chicago" in the Sivyer recognition clause implied that the employees could not exercise their seniority-recall rights at Bettendorf.

* * * * *

The geographic formula employed in the recognition clause of the contract in the instant case is a typical one found in many collective bargaining contracts:

---

[5] 39 Lab. Arb. at 454.

[6] *Zdanok v. Glidden Co.*, 288 F. 2d 99 (2d Cir. 1961), *cert. granted on other grounds*, 368 U. S. 814.

[7] "The Second Circuit Court of Appeals majority held the *Glidden* phrase was not language of limitation, but merely described the location of the plant. . . .

"If there is a federal law under Section 301 of the National Labor Relations Act applicable to this court[*sic*], the Court of Appeals of the the Second Circuit reads it one way and the Court of Appeals of the Sixth Circuit another." 39 Lab. Arb. at 454.

> The company recognizes the union as the exclusive representative of its employees in its plant or plants located in ———— (a particular city, part of a city, county, state, etc.).[8]

It has been clear since July 16, 1962, when the Sixth Circuit handed down its decision in the instant case, that unless this decision is reviewed and reversed employees in the states of the Sixth Circuit who work under collective bargaining contracts with recognition clauses that employ the above geographic formula have seniority-recall rights which will be cut off if their plants are moved beyond the described geographic area, even though there is no language in their contracts which says so.

The *Sivyer* case, however, indicates that the sweep of the Sixth Circuit's rule of implication is likely to be far broader than this—broad enough, indeed, to reach *all* contracts with recognition clauses that include *any* type geographic reference, even the simplest one, such as the one in *Sivyer:*

> The company recognizes the union as the exclusive bargaining representative of its employees in its plant at ———— (city, state).

A rule which will have an impact on so many employees, employers, and unions is an important rule which should be reviewed.

---

[8] "Recognition of the union in new plants is sometimes mentioned in contracts. Recognition may be automatic in plants established *within a specified area*—or it may be negotiable." (Emphasis supplied). 2 BNA Collective Bargaining Negotiations and Contracts (Basic Patterns in Union Contracts) 70:61 (1960).

Conclusion

In the Sixth Circuit, under the rule of the instant case, recognition clauses have the new, implied function of delineating the geographic area within which employees can exercise their seniority-recall rights.

In the Second Circuit, under *Glidden*, and the Third Circuit, under *Viking*,[9] recognition clauses clearly do not have this new function.

In *Lucas Flour* this Court said:

> "*The possibility that individual contract terms might have different meanings* under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements."[10] (Emphasis supplied)

We submit that the present conflict between the Sixth Circuit and the Second and Third Circuits as to the meaning and basic function of recognition clauses has already and will continue to "exert a disruptive influence upon both the negotiation and administration of collective agreements", unless resolved by this Court.

Respectfully submitted,

HAROLD A. CRANEFIELD,
JOHN A. FILLION,
Counsel for Petitioners.

GORDON A. GREGORY,
ROBERT S. ROSENFELD,
Of Counsel.

Dated: November 21, 1962.

---

[9] *Metal Polishers Union v. Viking Equipment Co.*, 278 F. 2d 142 (3d Cir. 1960). The conflict on this rule between the Sixth Circuit and the Second and Third Circuits is discussed in the petition at pp. 25-28.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 27 1962
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. 514.

JAMES ODDIE, EDWARD CWIERTNIEWICZ,
JOHN PENZAK, OSCAR KING,
HARRY C. BREMMER,
Petitioners,

vs.

ROSS GEAR AND TOOL COMPANY, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

RESPONDENT'S SUPPLEMENTAL BRIEF.

OWEN J. NEIGHBOURS,
JAMES M. NICHOLSON,
1350 Consolidated Building,
Indianapolis, Indiana,
Counsel for Respondents.

CADICK, BURNS, DUCK & NEIGHBOURS,
1350 Consolidated Building,
Indianapolis, Indiana,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-5847

In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. 514.

JAMES ODDIE, EDWARD CWIERTNIEWICZ, JOHN PENZAK, OSCAR KING, HARRY C. BREMMER,

Petitioners,

vs.

ROSS GEAR AND TOOL COMPANY, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

RESPONDENT'S SUPPLEMENTAL BRIEF.

ARGUMENT.

Petitioners' Reply Brief urges that a recent decision of an arbitrator[1] demonstrates the necessity for the granting of a writ of certiorari herein. It is said that this decision is "* * * concrete evidence that the Sixth Circuit, in interpreting the collective bargaining contract in the instant case, laid down a general rule of interpretation. * * *"[2]

Although it seems axiomatic that the decision of an arbitrator hardly can be characterized as "concrete evidence" of the meaning of an opinion of a federal court of appeals, the opinion of the arbitrator in *Sivyer* was not in-

[1] *Sivyer Steel Casting Co.*, 39 Lab. Arb. 449 (1962).

[2] Petitioners' Reply Brief, p. 2.

tended to, and does not, demonstrate adherence to a "* * * new rule of collective bargaining contract interpretation laid down by the Sixth Circuit * * *."[3]

Although the arbitrator discussed both *Glidden*[4] and the opinion of the Sixth Circuit in the instant case, it is evident from the arbitrator's decisions, set forth in his Summary of Issues,[5] that he appropriately exercised his functions as arbitrator, and decided the issues presented by the grievances within the framework of the contract and the factual evidence presented by the union and the employer. The arbitrator in the *Sivyer* case analyzed the language of the contract there involved and found such language to be more closely analogous to the language of the Gemmer contract than to the language of the Glidden contract. As was his province, the arbitrator decided the case in light of the contract and the evidence before him.

Petitioners, in their Reply Brief, again confuse differing results with conflicting rules of law. This confusion is based upon their misconstruction of the opinion of the Court of Appeals for the Second Circuit in *Glidden* which they characterize as a "* * * rule that recognition clauses do not perform that function * * *" that is, the function of limiting employees' seniority recall rights.[6]

In *Glidden*, the court found the particular language employed in the preamble clause of *that* contract did not operate to establish fixed boundaries for the rights asserted. The Second Circuit did not establish a rule that

---

[3] Petitioners' Reply Brief, p. 3.

[4] *Zdanok v. Glidden*, 288 F. 2d 99 (2d Cir. 1961), *cert. granted on other grounds*, 368 U. S. 814.

[5] 39 Lab. Arb. 449, 558-559.

[6] Pet. Reply Brief, p. 5.

recognition clauses do not function to limit rights under collective bargaining agreements. *Glidden was not concerned in any way with recognition clauses or the function of recognition clauses.* The clause the Second Circuit construed in *Glidden* was the *preamble* clause of that contract.[7] The court held that the particular language used in that clause of *that* contract did not limit the area within which rights thereunder could be exercised. Petitioners misconstrue *Glidden* when they assert[8] that it establishes a rule that recognition clauses do not perform a limiting function. Although the Second Circuit found that the specific terms used did not provide geographic limitations to the provisions of that contract, it is implicit in the court's extensive examination and analysis of the contract terms that it felt that a preamble clause could have defined an area for application of the contract if the parties had employed language manifesting such an intent. It is not held or suggested by the Second Circuit that recognition *or* preamble clauses do not perform the function of limiting rights under the contract.

Understandably counsel for Petitioners are hesitant to come to grips with the factual distinctions between the *Ross* and *Glidden* cases. In effect, they seek to establish a "rule of interpretation" that would *avoid* the intention of the parties to the Ross contract to limit it, in all its aspects, to the geographical area described. By failing to meet and answer the differences of fact, Petitioners have hoped to establish an issue of general importance and ap-

---

[7] Petitioners also err on page 7 of their Reply Brief in describing *Metal Polishers Union v. Viking Equipment Co.*, 278 F. 2d 142 (3d Cir. 1960) as concerned with *recognition* clauses. That case was also concerned with the particular language employed in the *preamble clause* of that contract. This case is discussed on pp. 13-15 of Respondent's Brief.

[8] Pet. Reply Brief, p. 5.

plication that would require consideration by this Court, but ignoring these factual differences does not wipe them from the record of this case.

CONCLUSION.

The interpretation of the Gemmer contract by the Court of Appeals below was based upon the intention of the parties as determined from the terms of the Gemmer contract and its collective bargaining history. The court below, without question, appropriately decided the issues before it. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

OWEN J. NEIGHBOURS,
JAMES M. NICHOLSON,
Counsel for Respondent.

Of Counsel:

CADICK, BURNS, DUCK & NEIGHBOURS.

November 26, 1962.

TABLE OF CASES.

Metal Polishers Union v. Viking Equipment Co., 278 F. 2d 142 (3d Cir. 1960) 3

Sivyer Steel Casting Co., 39 Lab. Arb. 449 (1962) 1, 2

Zdanok v. Glidden, 288 F. 2d 99 (2d Cir. 1961), *cert. granted on other grounds*, 368 U. S. 814 ..... 2, 3